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The public referendum is one of the political reforms generated by the Progressive movement during the first two decades of this century.[1] The term broadly refers to the submission of a public issue or governmental measure to a vote of the electorate.[2] The vote may or may not be binding on the governmental authority.[3]

Referendum devices may be categorized by subject matter as well as by the type of process used. Depending on the type of referendum and the jurisdiction, the referendum may be mandated by the state constitution or the legislative body, or it may be invoked by the people through a petition process. Constitutional amendments, for example, require a mandatory referendum in every state except Delaware.[4] In some states, citizens may propose amendments by petition.[5] Similarly, most states

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1. The Progressive movement generally describes a broad-based reformist activism that arose during the early years of this century, which resulted in significant political and social reforms. For a general analysis of the Progressive era, see 2 J. BRYCE, MODERN DEMOCRACIES 129-65 (1921); R. HOFSTADTER, THE AGE OF REFORM (1955); A. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA (1954); THE PROGRESSIVE ERA (L. Gould ed. 1974).

2. *See* Johnson, *Types of Referendum*, in THE REFERENDUM DEVICE 19 (A. Ranney ed. 1981). In most western nations, a referendum usually refers to the submission to the voters of a political decision previously made by the government. Butler, *The World Experience*, in THE REFERENDUM DEVICE, *supra*, at 176. For a review of the current referendum processes in other Western countries, see REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (D. Butler & A. Ranney eds. 1978).

3. For an example of nonbinding referenda, see N.J. REV. STAT. § 19:37-1 (1964) (countywide nonbinding referenda); *cf.* Farley v. Healey, 67 Cal. 2d 325, 431 P.2d 650, 62 Cal. Rptr. 26 (1967) (resolution calling for Vietnam cease-fire held proper subject of ballot initiative although beyond county government's power to effectuate by binding legislation); State v. Board of Elections, 12 Ohio St. 2d 4, 230 N.E.2d 347 (1967) (resolution calling for withdrawal from Vietnam).

4. Lee, *The American Experience, 1778-1978*, in THE REFERENDUM DEVICE, *supra* note 2, at 47.

5. For a list of these states, see D. MAGLEBY, DIRECT LEGISLATION 38-39 (1984). *See also* White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1133 (1952).

require a mandatory referendum for certain types of legislative acts.[6] Some states permit the legislature to use the legislative referendum device to direct that a bill be ratified by the voters as a condition for becoming law.[7]

The public referendum also may take the form of a comprehensive ballot process through which voters may mandate that statutory measures be placed on the ballot. This type of referendum is invoked by the timely filing of a petition signed by a specified percentage of the electorate.[8] By this method, the electorate assumes the powers of a super-legislature with the ability to propose and to enact laws, using the initiative,[9] or to suspend bills enacted by the legislature pending voter ratification, using the permissive referendum.[10] Many of the twenty-three states that authorize the initiative and the permissive referendum extend both processes to local governments either by constitutional provision[11] or by

6. Mandatory referenda may be required by the state constitution, *see, e.g.*, KY. CONST. § 171 (taxation); S.D. CONST. art. IX, § 1 (change of county boundaries), or by statute, *see, e.g.*, DEL. CODE ANN. tit. 22, §§ 812-813 (1974) (adopting home rule charter); N.Y. LOCAL FIN. LAW § 35.00 (McKinney 1958) (authorizing bond issues); N.C. GEN. STAT. § 160A-103 (1982) (changing the form of city government).

7. *See, e.g.*, OR. CONST. art. IV, § 1. The legislative referendum is employed in 19 states. Lee, *supra* note 4, at 47.

8. The following is a chronological listing of current statewide referenda provisions and the year in which the process originally was adopted: South Dakota (1898), S.D. CONST. art. III, § 1; Utah (1900), UTAH CONST. art. IV, § 1(2); Oregon (1902), OR. CONST. art. IV, § 1; Nevada (1904), NEV. CONST. art. XIX, §§ 1-6; Montana (1906), MONT. CONST. art. III, §§ 4-8; Oklahoma (1907), OKLA. CONST. art. V, §§ 1-8; Michigan (1908), MICH. CONST. art. II, § 9; Missouri (1908), MO. CONST. art. III, §§ 49-53; Maine (1909), ME. CONST. art. IV, pt. 3, § 17; Arkansas (1909), ARK. CONST. amend. VII; Colorado (1910), COLO. CONST. art. V, § 1; Arizona (1910), ARIZ. CONST. art. IV, pt. 1; New Mexico (1911), N.M. CONST. art. IV, § 1 (referendum only); California (1912), CAL. CONST. art. II, §§ 8-9; Idaho (1912), IDAHO CONST. art. III, § 1; Nebraska (1912), NEB. CONST. art. III, §§ 1-4; Ohio (1912), OHIO CONST. art. II, § 1; Washington (1912), WASH. CONST. amend. LXXII; North Dakota (1914), N.D. CONST. art. III, §§ 1-10; Maryland (1915), MD. CONST. art. XVI, §§ 1-3 (referendum only); Massachusetts (1918), MASS. CONST. amend. XLVIII. Forty years lapsed before Alaska ratified its constitution, which contains the initiative and referendum. ALASKA CONST. art. XI. In 1967, Wyoming became the most recent state to embrace a statutory process. WYO. CONST. art. III, § 52.

9. Wyatt v. Clark, 299 P.2d 799, 801 (Okla. 1956) ("Initiative is the power reserved to the people by the constitution to propose bills or laws and to enact or reject them independent of legislative [sic] assembly."); *see* E. BACON & M. WYMAN, DIRECT ELECTIONS AND LAW MAKING BY POPULAR VOTE 1 (1912).

10. Ritchmount Partnership v. Board of Supervisors, 283 Md. 48, 388 A.2d 523 (1978); State *ex rel.* Wagner v. Summers, 33 S.D. 40, 144 N.W. 730 (1913). This form has also been referred to as the "petition referendum," Lee, *supra* note 4, at 47, the "protest referendum," Price, *The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon*, 28 W. POL. Q. 243, 245 (1975), and the "popular referendum," D. MAGLEBY, *supra* note 5, at 36.

11. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1; ARK. CONST. amend. VII; CAL. CONST.

statute.[12] Several jurisdictions that have not adopted the permissive ballot at the state level nevertheless permit it at the local level[13] or enable home rule cities to adopt it.[14]

Where comprehensive ballot processes have been embraced, they have been used repeatedly at both the state and local levels.[15] Recent referenda on controversial political issues such as property tax limitation, nuclear freeze, and gun control have rekindled public awareness of this political remedy, renewed the debate concerning its purposes, limitations, and merits,[16] and spawned a modest amount of academic commentary.[17]

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art. II, § 11; COLO. CONST. art. V, § 1; ME. CONST. art. IV, pt. 3, § 21; MONT. CONST. art. XI, § 8; NEV. CONST. art. XIX, § 4; OKLA CONST. art. V, § 5; OR. CONST. art. IV, § 1(5); S.D. CONST. art. III, § 1; UTAH CONST. art. VI, § 1 (2); WYO. CONST. art. XIII, § 1.

12. *See, e.g.*, ALASKA STAT. § 29.28.060 (1962); IDAHO CODE § 50-501 (1980); MO. ANN. STAT. § 78.220 (Vernon 1970); N.D. CENT. CODE §§ 40-12-01 to -13 (1968); WASH. REV. CODE ANN. §§ 35-17.220 to .240 (1964).

13. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-157 (West 1967); KY. REV. STAT. § 89-600 (1979); LA. REV. STAT. ANN. § 33-1283 (West 1951); MISS. CODE ANN. § 21-9-65 (Supp. 1984); N.J. REV. STAT. § 40:74-5 (Supp. 1984); N.Y. COUNTY LAW §§ 100-104 (McKinney 1972); PA. STAT. ANN. tit. 53, §§ 36030-36064 (Purdon 1972); S.C. CODE ANN. §§ 5-17-10 to -30 (Law. Co-op 1976); WIS. STAT. ANN. § 59.07 (West 1985) (authorizes legislative referendum for county government).

14. Home rule refers to the right of the people of a local area to create their own local government, to define its powers, and to describe the boundaries within which it is to exist. Younger v. Board of Supervisors, 93 Cal. App. 3d 864, 869, 155 Cal. Rptr. 921, 924 (1979); *see, e.g.*, WASH. REV. CODE ANN. § 35A.29.170 (Special Pamphlet 1986); W. VA. CODE § 8-12-14 (1984); *see also* City of Winter Springs v. Florida Land Co., 413 So. 2d 84 (Fla. Dist. Ct. App. 1982) (city charter provided for referendum).

15. It has been estimated that 12,000 to 15,000 propositions have been placed on statewide ballots since the turn of the century and that as many as 16,000 local ballot issues were decided in one recent presidential election year alone. Clubb & Traugott, *National Patterns of Referenda Voting: The 1968 Election*, in PEOPLE AND POLITICS IN URBAN SOCIETY 137 (H. Hahn ed. 1972).

16. *See generally* D. MAGLEBY, *supra* note 5, at 5-7. Part of the debate has centered on the call for a national referendum. *See* Allen, *The National Initiative Proposal: A Preliminary Analysis*, 58 NEB. L. REV. 965 (1979); Snyder, *The Proposed National Initiative Amendment: A Participatory Perspective on Substantive Restrictions and Procedural Requirements*, 18 HARV. J. ON LEGIS. 429 (1981). For a summary of statewide ballot proposals through 1976, see CONGRESSIONAL RESEARCH SERVICE, INITIATIVE REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS (1976), *reprinted in Proposed Voter Initiative Constitutional Amendment: Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 280 (1977).

17. Professor Price notes that, since the adoption of these devices, interest on the part of the academic community gradually has waned. Price, *supra* note 10, at 244. Leading works published contemporaneously with the adoption of referenda include: J. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON (1915); C. BEARD & B. SHULTZ, DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM AND RECALL (1912); J. BOYLE, THE INITIATIVE AND REFERENDUM (1912); C. LOBINGER, THE PEOPLE'S LAW (1909); W. MUNRO, THE INITIATIVE, REFERENDUM AND RECALL (1912); E. OBERHOLTZER, THE REFERENDUM IN AMERICA (1912). For articles regarding the nature and purpose of initiative referendum devices, see Bourne, Jr., *Functions of the Initiative, Refer-*

Many courts have observed that initiative and permissive referendum processes essentially establish the electorate as a law-making body coequal with the elected assembly,[18] thereby creating the potential for conflict.[19] In theory, the permissive referendum process allows a small percentage of voters to place on the ballot every measure enacted by the

endum and Recall, 43 ANNALS 3 (1912); Campbell, *The Initiative and Referendum*, 10 MICH. L. REV. 427 (1912). For World War II era articles, see Houghton, *Arizona's Experience with the Initiative and Referendum*, 29 N.M. HIST. REV. 183 (1954); Johnston, *The Initiative and Referendum in Washington*, 36 PAC. NW. Q. 29 (1945); Key & Crouch, *The Initiative, Referendum and Recall in California*, 6 PUBLICATIONS SOC. SCI. 423 (1939).

Commentaries offering an overview of the substantive and procedural restraints on constitutional and statutory ballot processes in individual states include: Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495 (1950); Grossman, *The Initiative and Referendum Process: The Michigan Experience*, 28 WAYNE L. REV. 77 (1981); Lowe, *Restrictions on Initiative and Referendum Powers in South Dakota*, 28 S.D.L. REV. 53 (1982); Stewart, *Law of Initiative Referendum in Massachusetts*, 12 NEW ENG. L. REV. 455 (1977); Trautman, *Initiative and Referendum in Washington—A Survey*, 49 WASH. L. REV. 55 (1973); Note, *Judicial Limitations on the Initiative and Referendum in California Municipalities*, 17 HASTINGS L.J. 805 (1966); Comment, *The Scope of Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

Commentaries treating the topic of campaign financing of ballot measures include: Fox, *Corporate Political Speech: The Effect of* First National Bank of Boston v. Bellotti *Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75 (1978); Mickenberg, *Constitutionality of Limitations on Contributions to Ballot-Measure Campaigns*, 12 SW. U. L. REV. 527 (1980); Mueller & Parrinello, *Constitutionality of Limits on Ballot Measure Contributions*, 57 N.D.L. REV. 391 (1981).

A few commentaries address the issue of zoning by referenda: Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265 (1978); Note, *Zoning by Initiative in California: A Critical Analysis*, 12 LOY. L.A.L. REV. 903 (1979); Note, *Zoning—Adjudication by Labels: Referendum Rezoning and Due Process*, 55 N.C.L. REV. 517 (1977).

The effect of referenda on civil rights is analyzed in the following: Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Murasky, James v. Valtierra, *Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115 (1971); Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest Cities Enterprises, Inc., 91 HARV. L. REV. 1373 (1978); Seely, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881 (1970); Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637 (1980); Note, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L. ANN. 135 (1981).

18. *See, e.g.*, Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972); State *ex rel.* Goodman v. Stewart, 57 Mont. 144, 187 P. 641 (1920); Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966).

19. As Chief Justice Marshall observed in his dissent in State *ex rel.* Durbin v. Smith, 102 Ohio St. 591, 133 N.E. 457 (1921):

> There being therefore two distinct, concurrent legislative bodies, having power to deal with the same subject at the same time, and the people having at the same time the right by referendum to review and possibly nullify the action of the legislature, it is quite natural that a conflict should occasionally arise between the two legislative bodies . . . .

Id. at 611, 133 N.E. at 463.

state legislature or local council[20] whose ability to govern may be substantially impaired. In those jurisdictions where deferred laws are suspended until approved by the voters, the permissive referendum can nullify vital measures whose importance to society depends upon the certainty of timely enforcement.[21] Consequently, the twenty-three jurisdictions that have made the permissive referendum part of their law-making process limit the ability of the electorate to veto certain types of legislation.[22] The two most common substantive exclusions from the permissive referendum process are laws that deal with state fiscal matters and laws that are necessary for the immediate preservation of public peace, health, and safety.

The fiscal limitation—the more specific of the two restrictions—has been phrased variously as excluding from the referendum appropriation measures,[23] tax levies,[24] or any act necessary for the support of state government and its existing institutions.[25] The public safety limitation, on the other hand, is omnibus in scope. Like many restrictions, the public safety exception seeks to prevent the abuse of legislative power.

The public safety exception operates in one of three ways. First, in nine of the twenty-three referendum states, a law that purports to have been enacted to preserve the public peace, health, or safety takes effect immediately upon passage, subject to voter veto by permissive referendum. Enforcement of the act is not suspended pending the election.[26]

20. Signature requirements vary from state to state. Wyoming imposes one of the more stringent requirements, requiring 15% of those voting in the preceding general election, with signators residing in at least two-thirds of the counties. WYO. CONST. art. III, § 52(c). In Massachusetts, a measure may be referred with signatures totaling two percent of the votes cast in the preceding gubernatorial election. MASS. CONST. amend. XLVIII, pt. 3, § 3. For a compendium of state requirements, see D. MAGLEBY, *supra* note 5, at 38.

21. For example, a legislative act creating a remedy for victims of toxic chemicals or establishing a task force to develop a cure for AIDS will be of little value to the public if it is suspended pending the next general election. *See* ALASKA CONST. art. XI, § 7; CAL. CONST. art. II, § 9. In California, the referred act is automatically suspended pending the outcome of the referendum. *Id.* In other states, the act may be suspended if the number of signatures canvassed is greater than the number required to place the act on the ballot. *See* NEB. CONST. art. III, § 3.

22. *See supra* note 8.

23. *See, e.g.,* MICH. CONST. art. II, § 9; NEB. CONST. art. III, § 3.

24. *See, e.g.,* CAL. CONST. art. II, § 9(a); OHIO CONST. art. II, § 1(d).

25. *See, e.g.,* ARIZ. CONST. art. IV, pt. 1, § 1(3); S.D. CONST. art. III, § 1.

26. Arkansas: ARK. CONST. amend. VII; Idaho: Johnson v. Diefendorf, 56 Idaho 620, 57 P.2d 1068 (1936) (emergency legislation effective immediately and remains in effect unless defeated at a referendum election or repealed); IDAHO CONST. art. III, §§ 1, 22; Maryland: Biggs v. Maryland Nat'l Capital Parks & Planning Comm'n, 269 Md. 352, 306 A.2d 220 (1973) (An emergency bill, although not subject to judicial review as to existence of an emergency, may remain in effect only 30 days after it has been rejected in a referendum vote.); MD. CONST. art. XVI, § 2; Massachusetts: Molesworth v. Secretary of Commonwealth, 347 Mass.

Second, in Utah the legislature has the power to preempt the voter's option without regard to the nature of the measure, simply by adopting the law by a two-thirds majority.[27] Finally, acts passed as public safety measures in the remaining thirteen states are constitutionally barred from voter review and possible veto.[28] In these states, there is considera-

47, 196 N.E.2d 312 (1964); MASS. CONST. amend. XLVII, pts. 2, 3, § 2; Stewart, *The Law of Initiative Referendum in Massachusetts*, 12 NEW ENG. L. REV. 455 (1977); Michigan: MICH. CONST. art. II, § 9; Grossman, *The Initiative and Referendum Process: The Michigan Experience*, 28 WAYNE L. REV. 77, 101 n.140 (1981); Montana: MONT. CONST. art. III, § 5; MONT. CODE ANN. § 1-2-205 (1985) (no public safety exception); Nebraska: Klosterman v. Marsh, 180 Neb. 506, 143 N.W.2d 744 (1966) (reversing district court decision to enjoin the Secretary of State from permitting a state income tax act to be referred to the electorate); NEB. CONST. art. III, §§ 3, 27: Nevada: Morton v. Howard, 49 Nev. 405, 248 P. 44 (1926) (referred law not suspended or annulled until majority of electors vote against it); NEV. CONST. art. 19, § 1; North Dakota: Dawson v. Tobin, 74 N.D. 713, 24 N.W.2d 737 (1946) (property tax declared an emergency measure takes effect immediately, but is subject to referendum); N.D. CONST. art. IV, §§ 25, 41.

The Model Constitution for state government also recommends this form. MODEL STATE CONST. art. IV, § 404 (National Mun. League 5th ed. 1948). The sixth edition substitutes a legislative referendum in place of an optional referendum. *Id.* at app. § .02 (6th ed. 1968).

27. UTAH CONST. art. VI, § 25 (1900).

28. ALASKA CONST. art. XI, § 7 ("The referendum shall not be applied . . . to laws necessary for the immediate preservation of the public peace, health or safety."); ARIZ. CONST. art. IV, pt. 1, § 1(3) ("except laws immediately necessary for the preservation of the public peace, health or safety"); CAL. CONST. art. II, § 9(a) ("The referendum is the power of the electors to approve or reject statutes . . . except urgency statutes . . . ."); COLO. CONST. art. V, § 1 ("The second power hereby reserved is the referendum, and it may be ordered except as to laws necessary for the immediate preservation of the public peace, health or safety . . . ."); ME. CONST. art. IV, pt. 3, § 17 ("[u]pon written petition of electors . . . requesting that one or more Acts . . . passed by the Legislature, but not then in effect by reason of the provisions of the preceding section, [i.e., measures immediately necessary for the preservation of the public peace, health, or safety] be referred to the people"); MO. CONST. art. III, § 52(a) ("A referendum may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety . . . ."); N.M. CONST. art. IV, § 1 ("The people reserve the power to disapprove, suspend and annul any law . . . except . . . laws providing for the preservation of the public peace, health or safety . . . ."); OHIO CONST. art. II, § 1(d) ("[E]mergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. . . . The laws mentioned in this section shall not be subject to the referendum."); OKLA. CONST. art. IV, § 2 ("The second power is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety . . . ."); OR. CONST. art. IV, § 1(3)(a) ("The people reserve to themselves the referendum power . . . to approve or reject . . . any Act . . . that does not become effective earlier than 90 days after the end of the session . . . ."); S.D. CONST. art. III, § 1 ("[T]he people expressly reserve . . . the right to require any law . . . be submitted to a vote of the electors . . . except laws as may be necessary for the immediate preservation of the public peace, health or safety . . . ."); WASH. CONST. amend. LXXII(b) ("The second power reserved by the people is the referendum, and it may be ordered on any act . . . except such laws as may be necessary for the immediate preservation of the public peace, health or safety . . . ."); WYO. CONST. art. III, § 52(g) ("The referendum shall not be applied to . . . laws necessary for the immediate preservation of the public peace, health or safety . . . .").

ble disagreement as to whether, and to what extent, the courts may review a state legislative declaration of public safety.[29] The courts are similarly split on the reviewability of public safety ordinances passed by local government.[30]

Unlike the referenda on constitutional amendments and initiatives, the permissive referendum has been exercised infrequently at the state level over the last twenty-five years.[31] Use of the device at the local level has been more pervasive.[32] Public safety clauses, on the other hand, continue to be popular and are included in a considerable amount of contemporary legislation.[33]

Courts that are called upon to construe and determine the binding

29. Eight of the thirteen state supreme courts have refused to review the legislative finding or have done so on only a very limited basis. These states are Arizona, California, Colorado, Maine, Ohio, Oklahoma, Oregon, and South Dakota. *See infra* note 158 & accompanying text. Three states have reviewed the legislative determination. These are the states of Missouri, New Mexico, and Washington. *See infra* notes 160, 162-72 & accompanying text. Two states, Alaska and Wyoming, have not yet faced the issue. The issue also arises in nonsuspension states. One who files a referendum petition also may claim that the law sought to be referred should not take effect in the interim. Courts from those states that have decided the issue have not been willing to review the public safety declaration that places the act immediately in effect. *See* Molesworth v. Secretary of the Commonwealth, 347 Mass. 47, 196 N.E.2d 312 (1964); Read v. City of Scottsbluff, 179 Neb. 410, 138 N.W.2d 47 (1965); Cuthbert v. Smutz, 68 N.D. 578, 282 N.W. 494 (1938).

30. Referral of local legislation may be required by the referendum provision in the state constitution, *see supra* note 11, or by statute, *see supra* notes 12-13. The eight nonreview or limited-review jurisdictions apply the same standard of review to public safety ordinances at the municipal level. *See* cases cited *infra* note 158. The three states that will review a safety act passed by the legislature—Missouri, New Mexico, and Washington—also will review one adopted by a local council. *See* cases cited *infra* notes 170, 172.

In addition, one who seeks to refer a city ordinance in the states of Louisiana, LA. REV. STAT. ANN. §§ 33-1282 to -1283 (West 1953), and Pennsylvania, PA. STAT. ANN. §§ 53-36050 to -36051 (Purdon 1957), will have to convince a court to overturn a finding of public necessity by the city council in order to get the matter before the voters.

31. *See* Price, *supra* note 10, at 245. Since 1960, for example, the permissive referendum has been invoked against a legislative act twice in Alaska, Arizona, Idaho, Michigan, and Nevada; three times in Maine, Missouri, Nebraska, and Oklahoma; four times in California and Massachusetts; five times in Oregon; six times in South Dakota; and seven times in Washington. Letters from the respective Secretaries of State to author (copies of letters on file with *The Hastings Law Journal*).

32. One commentary suggests that for each state ballot measure as many as 50 local propositions may be submitted to the voters during an election. Clubb & Traugott, *supra* note 15, at 137.

33. The prevalent use of safety clauses prompted a commentator from an earlier era to label the practice a "subterfuge." *Legislation—The Repeal of the Referendum in Colorado*, 43 HARV. L. REV. 813, 816 (1930) [hereinafter cited as *Legislation*]. A random, but not scientific, sample of recent enactments indicates that this legislative habit remains unabated. Arizona, 1984 Ariz. Sess. Laws, 2d Reg. Sess., table IV (Supp.) (66 emergency acts of 398 passed); Arkansas, 1983 Ark. Acts, parallel ref. tables (Supp.) (314 emergency acts of 937 passed); Nebraska, 1984 Neb. Laws, app. cross ref. table (Supp.) (81 emergency acts of 300 passed);

effect of a legislative public safety declaration[34] must determine whether the permissive referendum should play a significant role in a community's political decision-making process, or whether it should function only as a check on governmental power.[35] When properly applied, the public safety exception should minimize the conflict between the voters and the legislative body by giving the people the option to oversee most legislative actions without destroying the ability of the assembly to enact measures to resolve a temporary crisis. If the courts view the legislative finding as nonjusticiable, however, the legislature or local council may circumvent the ballot option and thwart a threatened referendum simply by declaring that the legislation is necessary to preserve the public welfare.[36]

Oregon, 1983 Or. Laws, comp. sec. tables (288 emergency acts of 831 passed); South Dakota, 1984 S.D. Sess. Laws, parallel table interim (Supp.) (2 emergency acts of 363 passed).

34. Arguably the initiative renders the permissive referendum obsolete because the objective of the referendum—the veto of a measure—can be accomplished by initiating a repeal of the act. *See* Greenberg v. Lee, 196 Or. 157, 248 P.2d 324 (1952). This position is also taken by one advocate of the national direct ballot process. Allen, *supra* note 16, at 968 n.12. Most states, however, make it more difficult to initiate a law by requiring a greater number of signatures to qualify an item for the ballot. In Arizona, for example, initiatives require signatures by fifteen percent of the voters, as opposed to five percent for referenda. ARIZ. CONST. art. IV, pt. 1, § 1; *see also* ARK. CONST. amend. VII (eight percent versus six percent); OKLA. CONST. art. V, § 2 (eight percent versus five percent); WASH. CONST. amend. XXX (eight percent versus four percent); *cf.* Dawson v. Tobin, 74 N.D. 713, 738, 24 N.W.2d 737, 748 (1946) (referendum more efficient process for people to reject laws).

Although the majority rule allows repeal by initiative, *e.g.*, Sims v. Moeur, 41 Ariz. 486, 19 P.2d 679 (1933); McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969 (1980), the minority rule prevents use of the initiative to refer a measure not subject to the referendum, *e.g.* Myers v. City Council, 241 Cal. App. 2d 237, 243, 50 Cal. Rptr. 402, 406 (1966) (repeal of tax ordinance); Commonwealth v. Marks, 7 Berks 116 (Penn. 1914), and precludes the referral of only part of a public safety law when the referral would circumvent the act, *e.g.* State *ex rel.* Pennock v. Reeves, 27 Wash. 2d 739, 179 P.2d 961 (1947). Moreover, a repealer may not be an effective remedy when suspension of the law pending the vote is not permitted, as was the case with the purchase of a railroad. *See* Gravning v. Zellmer, 291 N.W.2d 751 (S.D. 1980). Finally, the Progressives intended the referendum to be a remedial device separate and apart from the initiative. "If the people had been content to adopt that plan alone, they would not have reserved the right of referendum at all." State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 315, 147 P. 11, 17 (1915).

35. The permissive referendum has been described as "a gun behind the door." C. ADRIAN & C. PRESS, GOVERNING URBAN AMERICA 163 (1972). As one court stated:

> The potential virtue of the "I. & R." [initiative and referendum] does not reside in the good statutes . . . initiated, nor in the bad statutes . . . that are killed. Rather, the greatest efficiency of the "I. & R." rests in the wholesome restraint imposed automatically upon the general assembly and the governor and the possibilities of that latent power when called into action by the voters.

Nolan v. Clendening, 93 Ohio St. 264, 277-78, 112 N.E. 1029, 1032 (1915).

36. The power of the legislative body to cancel the referral of a legislative decision by declaring the act necessary for public welfare has prompted little commentary, but that commentary is generally negative. Ewing, *The Emergency Epidemic*, 4 STATE GOV'T 3 (1931);

This Article focuses on one of the more common restrictions on the exercise of the permissive referendum at the state and local levels—the public safety exception. The Article first examines the origins and political implications of the initiative and referendum processes.[37] Next, the Article reviews the traditional judicial deference to legislative declarations of emergency that require laws to become effective immediately upon passage. The Article then analyzes the two dominant early judicial approaches to construing the public safety exception to the referendum process. The Article compares effective date clauses with public safety clauses in light of the political question doctrine and concludes that the judiciary should play a more active role in the review of legislative public safety declarations. Finally, the Article proposes several factors that courts should balance in order to determine whether a legislative declaration of public safety should be permitted to prevent referral of a bill for popular ratification or veto.

The Permissive Referendum: A Political Assessment

Ballot Processes in General

Most research by political scientists on direct democracy fails to differentiate between different forms of referenda in assessing their frequency, their effects on the political process, and related issues of voter behavior. Discussions of ballot measures that are initiated by petition predominate in the literature partly because this form is used more frequently than other types of referenda.[38] Regardless of the procedure

Legislation—Emergency Legislation, 44 HARV. L. REV. 851, 854 (1931) [hereinafter cited as *Emergency Legislation*]; *Legislation*, *supra* note 33, at 817; Note, *Judicial Review of Exceptions from the Referendum*, 10 CALIF. L. REV. 371, 383 (1922); Note, *And to Declare an Emergency*, 1 OHIO ST. L.J. 40 (1935); Note, *The Emergency Clause*, 19 OR. L. REV. 73 (1930).

Interestingly, the Swiss Federal Constitution of 1874, which was a model for the Progressives, also shielded laws of an "urgent" nature from the referendum. *See* 1 J. BRYCE, MODERN DEMOCRACIES 374-75 (1921). The arbitrary enactment of urgency measures to circumvent the referendum was criticized by scholars of that day. S. DEPLOIGE, THE REFERENDUM IN SWITZERLAND 146-50 (1898). Professor Bryce in his treatise relates an anecdote about a member of the Swiss assembly who opposed a declaration of urgency with respect to certain legislation. The member told the story of a man who desired to eat a chicken during Lent; he baptized it as a fish, and his conscience was clear. In like manner, he argued, the legislature was attempting to baptize an act as urgent, when clearly it was not. 1 J. BRYCE, *supra*, at 375 n.2.

37. This discussion purposely omits the problems posed by specific types of legislation, most notably minority legislation. For an analysis of this threat and the call for judicial protection, see Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978). *See also* articles cited *supra* note 17.

38. *See* Lee, *supra* note 4, at 49-50. Of the several thousand statewide propositions decided over the last 25 years, only a few were placed on the ballot through the permissive

used to place an issue on the ballot, the question of whether popular lawmaking leads to rational decisions or to better government is the same. The research on initiatives, therefore, is a valuable starting point for evaluating the permissive referendum.

The permissive referendum, like the initiative, was one of several Progressive reforms designed to increase direct citizen participation in government, unfettered by intermediate institutions.[39] At the core of the referendum is a definition of democracy based on a faith in the people:

> At the heart of all notions about the contributions to be made by participatory democracy . . . is a belief in the deliberative and moral potential of ordinary people; that given the proper education and environment, people can be both responsible and reflective. At its base is a faith in the capacity of perfectly ordinary human beings to govern themselves wisely.[40]

The popular referendum zealously promotes this faith by making "every man his own legislature."[41]

The objective of democracy for the populists is to give those who must live with governmental policies the opportunity to select those policies directly. This objective assumes that "issues rather than candidates' promises or images are the main substance of politics."[42] It also assumes that a policy based on popular will results in the best decision because it is the most legitimate.[43] A dogmatic populist would not contend that individuals function in a social and political vacuum, but that, although people sometimes may behave irrationally, they should have the right to make their own mistakes.[44] Under this view, individual participation in the existing political institutions encourages citizens to become better educated about those institutions. This education enhances each citizen's decision-making ability and helps him to develop a democratic personality that considers the welfare of others as well as his own self-interest.[45]

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referendum process. *Compare supra* note 31 (frequency of use of permissive referenda) *with* D. MAGLEBY, *supra* note 5, at app. C (frequency of use of initiatives).

39. The suggested reforms included direct primaries, home rule for cities, direct election of United States Senators, and women's suffrage. D. MAGLEBY, *supra* note 5, at 23.

40. Greenberg, *Industrial Democracy and the Democratic Citizen*, 43 J. POL. 964, 965 (1981).

41. J. BARNETT, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON 16 (1915).

42. Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience 1914-1973*, 28 W. POL. Q. 330, 331-32 (1975).

43. Rousseau proclaimed that "[a]ny law which the people in person [have] not ratified is null; it is not a law." J. ROUSSEAU, THE SOCIAL CONTRACT ch. XV, at 145 (R. Harrington trans. 2d ed. 1893).

44. H. HAMILTON & S. COHEN, POLICY MAKING BY PLEBISCITE: SCHOOL REFERENDA 255 (1974).

45. Greenberg, *supra* note 40, at 967. Aristotle's defense of participatory democracy ac-

Although the populists succeeded in their promotion of ballot processes at the turn of the century, they did not press for the abolition of the existing forms of representative law-making bodies. Indeed, the populists advocated the initiative and referendum processes as much for their remedial qualities as for their utopian ones. The ballot device was one method of breaking the control held by special interest groups and reducing the corruption of legislators and other political officials.[46] Thus, the process was not intended to supplant legislatures and city councils, but to complement other reforms in leading to a more open and responsive government.[47]

Despite the widespread adoption of direct legislative devices, political scientists generally have not shared in the enthusiasm for direct legislation as an alternative to representative institutions, or even as a remedial device of last resort.[48] Much of their criticism focuses on either the deficiencies of the American voting public or on the shortcomings of the ballot process as compared to representative law-making. There are several principal objections to the ballot process. Those who oppose the direct legislative process assert that it suffers from two defects that inhibit effective decision-making. First, the process eschews the deliberation, debate, and compromise that is the heart of representative legislative action. Instead, the process "forces an all or nothing policy decision on the question as formulated by the sponsors alone."[49] Research in the area of public school referenda, for example, has led observers to remark that "[i]t would be difficult to argue that plebiscitary democracy in school districts inhibits the incidence of conflict or that it is a very efficacious instrument of conflict resolution."[50]

Second, legislative decision-making, unlike the ballot process, considers the intensity of demands as well as the percentage of the population that supports the demands. Proponents of this view claim that

knowledges that it may not be the best way to "judge" issues of public policy, but that it serves the first principle, or end, of politics—the perfection of man. Winthrop, *Aristotle on Participatory Democracy*, 11 J. NE. POL. SCI. A. 151, 170 (1978).

46. One commentator points out that "[t]o the Progressives, it was important to elevate to positions of political power the enlightened, dispassionate, independent citizen. Even more important, however, were the institutional and procedural reforms that would excise or severely limit the power of special interests, political parties, and corporations." D. MAGLEBY, *supra* note 5, at 22. For a brief account of the control exercised by the Southern Pacific Railroad in California, see L. TALLIAN, DIRECT DEMOCRACY: AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM, AND RECALL PROCESS 34-35 (1977).

47. D. MAGLEBY, *supra* note 5, at 23.

48. *See* Price, *supra* note 10, at 244.

49. D. MAGLEBY, *supra* note 5, at 184.

50. H. HAMILTON & S. COHEN, *supra* note 44, at 174.

individual voters cannot be relied upon to consider this important factor in decision-making.[51] Public opinion polls show that the preferences of all voters are not of equal intensity.[52] Moreover, research on voter demographics, rationality, turnout, and other aspects of voter behavior, as well as the exclusion of large segments of the population from the initiative process,[53] demonstrates the error of the central populist assumption that the vote is representative of the public will.[54] One prominent critic, David Magleby, claims that "the process of direct legislation is prone to considerable misrepresentation."[55] Other commentators charge that "asking voters to pass judgment on substantive policy questions strains their information and interest, leading them to decisions that may be inconsistent with their own desires."[56]

Voters themselves tend to undermine the legitimacy of the initiative process. Studies indicate that, in the weeks preceding an election, a majority of voters know nothing about highly publicized propositions that will appear on the ballot[57] and wait until the eve of the election to make up their minds.[58] Additionally, more people vote on gubernatorial and presidential candidates than on issue propositions.[59] According to one commentator, the initiative and referendum almost universally fail as a means for stimulating citizen participation:

> Voters appear to see proposition campaigns as they see most matters of government: they pay only limited attention, leaving to the activists and other attentive members of the public the task of closely monitoring politics. Voters are not very interested in most propositions—including some controversial ones, such as the nuclear power initiative or the equal rights amendment; they become very interested in only a

51. Two commentators have noted:

> The legislative process is responsive to intensity because legislators (consciously or unconsciously) ask themselves how much the interested parties care about the issue since they want to find out what the cost in votes and other forms of campaign support will be of disappointing one side or the other. . . . While politicians inevitably are imperfect in their calculations about intensity, voters are unlikely to make such judgments at all, particularly when their views are channeled through the referendum process. Nor are they likely to be disposed or able to make calculations about the possible ways in which a policy which they desire might detract from other of their preferences—such as for civil peace.

Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 768-69 (1968).

52. H. HAMILTON & S. COHEN, *supra* note 44, at 249.
53. A large number of eligible adults do not register to vote.
54. H. HAMILTON & S. COHEN, *supra* note 44, at 249.
55. D. MAGLEBY, *supra* note 5, at 144.
56. Wolfinger & Greenstein, *supra* note 51, at 767.
57. D. MAGLEBY, *supra* note 5, at 128.
58. Lee, *supra* note 4, at 56.
59. *Id.*

few initiative propositions.[60]

Referendum voters tend more often to be "predominantly white, affluent, better-educated, and of a higher subjective social class" than voters as a whole.[61] From data gathered during the 1968 election, observers have concluded that "there seems little reason to believe that the politically alienated and disaffected . . . exerted a major influence upon the collective outcome of referendum elections . . . ."[62] These findings challenge the claim that ballot options lead to more representative decisions or reduce political alienation.[63] Complicated and technically worded proposals further discourage participation by less sophisticated voters.[64] Confusion may undermine the decision-making process by encouraging voters to vote in the negative. Some campaigns explicitly exploit this confusion: "Confused? Many are. Play it Safe—When in Doubt, Vote No!"[65] Even the location of a measure on the ballot can affect voter response. Measures that do not appear near the top of the ballot are less likely to pass.[66] These factors may help to explain why California voters have rejected two-thirds of all initiative propositions.[67]

Opponents of direct democracy also refute the claim that initiatives and referenda advance the popular will by empowering the disenfranchised. According to one study, the outcome of statewide referenda is not determined by the alienated or disaffected, but rather by "the decisions of a small but interested, well-informed, and politically sophisticated segment of the larger electorate."[68] Research in the State of Washington, however, seems to support the populist claim. There, over one quarter of the initiatives were spawned by temporary, spontaneous, and less affluent interest groups, such as the League of Women Voters, public employees, consumers, pensioners, and sports enthusiasts.[69] Nevertheless, representation of the whole population is by no means assured. In California, for example, low-budget groups such as environmentalists that use the process do not necessarily select issues that most citizens would like to have decided by the ballot process.[70] In addition, the signature requirement for statewide measures, which in the State of California

60. D. MAGLEBY, *supra* note 5, at 127.
61. Lee, *supra* note 4, at 55.
62. Clubb & Traugott, *supra* note 15, at 165.
63. D. MAGLEBY, *supra* note 5, at 159-65.
64. *Id.* at 144.
65. *Id.* at 142.
66. *Id.* at 54.
67. Lee, *supra* note 4, at 58.
68. Clubb & Traugott, *supra* note 15, at 167.
69. Bone & Benedict, *supra* note 42, at 333.
70. D. MAGLEBY, *supra* note 5, at 182.

approaches five hundred thousand,[71] combined with the limited time in which to gather the signatures, forecloses the process to all but either the well financed or the well organized.[72] Moreover, the "act of setting the agenda by deciding which proposals to drop may be just as important a step as determining the outcome of those proposals which [are] retained."[73]

The predominance of special interest groups in the ballot processes raises additional concerns, such as the influence of campaign spending on the outcome of a vote. Clearly, the process is expensive, with millions of dollars spent campaigning for or against ballot measures.[74] Studies indicate that, although proponents of a measure cannot buy success at the polls, opponents can encourage a measure's defeat by outspending the proponents, particularly if voters are uncommitted on the issue.[75]

Critics also charge that ballot propositions disrupt the two-party system and hasten the ascension of single-issue politics. This criticism is related closely to the notion that direct legislation is a divisive process that substitutes conflict and "either/or" propositions for compromise and consensus. Mr. Magleby defines the problem as follows:

> The initiative weakens political parties because it allows groups to force public decision on issues framed by the groups themselves. . . . The traditional party roles of weighing competing interests, achieving compromise, and moderating demands in order to appeal to the maximum number of voters are not played by the parties in this process because they are not the participants. Single-issue groups may include

71. *Id.* at 68. Circulators also must gather enough signatures to compensate for those voided due to illegibility, lack of voter registration, or wrong precinct.

72. *Id.* at 76. It was reported that proponents of Proposition 22 in California paid a professional circulator $300,000 for signatures. L. TALLIAN, *supra* note 46, at 102. The unsuccessful initiated proposal was aimed at farm workers and rendered specified types of strikes and boycotts unlawful. *Id.* at 208.

73. Bone & Benedict, *supra* note 42, at 332. *See* D. MAGLEBY, *supra* note 5, in which Mr. Magleby states:

> Which people rule in direct legislation? Those who set the legislative agenda and those who actually vote on that agenda. Neither the issues put before the voters nor those voters who actually decide them are representative. The people who rule under direct legislation tend to be those who can understand and use the process. Less educated, poorer, and nonwhite citizens are organizationally and financially excluded from setting the direct legislation agenda because their own issue agendas are less articulated and because they lack the resources and personal efficacy to attempt a petition circulation and direct legislation campaign.

Id. at 183-84.

74. For example, in 1982 total campaign spending in California was approximately $120 million, with $36 million of that total earmarked for ballot measure contests. D. MAGLEBY, *supra* note 5, at 149. In 1979, the State of California spent $6.7 million in administering a special ballot election. *Id.* at 58.

75. *Id.* at 146-51.

> some of these concerns in their campaign strategy, but there is no institutional means to counter their issue perspective, and the propositions are thus typically more extreme than they would be if they were part of a party platform.[76]

Although the populist justifications for direct legislation have been attacked on theoretical grounds, experience with ballot processes has led several political analysts to accept a more moderate position. Professors Bone and Benedict have concluded that the State of Washington's experience has been positive and that the "[i]nitiative and referendum provide additional channels for political expression, linking the citizen to state government."[77] Professor Price closed his study by questioning "the prevailing negative assessment of initiatives."[78] Professor Sirico believes that the benefits outweigh the detriments and that referenda "offer a valuable safety valve to regulate the system's nondemocratic elements."[79] Mr. Magleby concludes that "[d]irect legislation has been neither as positive in its effect as proponents have frequently asserted nor as dire in its consequences as opponents have predicted."[80]

The direct legislative device has both liberal and conservative supporters.[81] According to Professor Ranney's study of elections between 1945 and 1976, voters tend to take liberal positions on economic issues and conservative positions on social issues.[82] "[T]he referendum is neither an unfailing friend nor an implacable enemy of either left or right."[83] Mr. Magleby concedes that the referendum can be an effective method of authoritatively resolving a policy dispute if the issue is fundamental and if all sides actively participate and accept the outcome.[84]

Professor Lee advocates a practical approach to analyzing the effectiveness of the ballot processes: "The initiative and referendum must be tested not against a theoretical model of democratic institutions but the

76. *Id.* at 189.

77. Bone & Benedict, *supra* note 42, at 349.

78. Price, *supra* note 10, at 262.

79. Sirico, *supra* note 17, at 646 n.75. Professor Joseph Zimmerman also advocates the use of the permissive referendum as a safety valve at the municipal level. Zimmerman, *Local Representation: Designing a Fair System*, 69 NAT'L CIVIC REV. 307, 311-12 (1980).

80. D. MAGLEBY, *supra* note 5, at 196; *see also* La Palombara & Hagan, *Direct Legislation: An Appraisal and a Suggestion*, 45 AM. POL. SCI. REV. 400, 421 (1951) ("prophecies of the opponents have [not] been borne out").

81. D. MAGLEBY, *supra* note 5, at 190. For a good discussion of its use for liberal causes, see L. TALLIAN, *supra* note 46.

82. Ranney, *The United States of America*, in REFERENDUMS, A COMPARATIVE STUDY OF PRACTICE AND THEORY, *supra* note 2, at 68, 85.

83. *Id.*

84. D. MAGLEBY, *supra* note 5, at 186. The example used was the question of whether Great Britain should join the Common Market. *See also* Butler, *supra* note 2, at 76.

real world of declining participation, weakened political parties, partisan legislative districting, and television-dominated election campaigns funded by massive contributions from special interests that also dominate legislation lobbying . . . ."[85] Moreover, one commentator has noted that "for most Americans issues of politics are not of central concern."[86] As Mr. Magleby observes:

> The public is equally as ignorant about institutions as it is about issues. Less than one-third of the adult population can explain the electoral college, and generally only 50-60 percent of the adult population can identify correctly which party has a majority in the House of Representatives. In addition, less than 50 percent of the adult population can recall the name of their congressman, and only 60 percent can name even one of their U.S. senators.[87]

Whatever the obstacles to rational, effective decision-making, they are not unique to referendum processes, but plague the political system in general.

Finally, recent polls indicate that a majority of the public favors direct legislative devices[88] and that the trend is to expand, not to restrict their use.[89] A New Jersey poll suggests that voters realize that many issues are too complicated to be decided simply by a yes or no vote, and that, as voters, they lack the understanding necessary to make rational choices.[90] Nevertheless, the poll reveals that the great majority of citizens believe that they should be able to vote directly on issues.[91] Other polls show that most people believe that ballot measures are more effective at influencing government than candidate elections.[92]

Special Features of the Permissive Referendum

Some of the criticism of direct democracy in general is not fully applicable to the permissive referendum. The permissive referendum may be exercised only in response to measures drafted, debated, and passed by a legislative body, which has had the opportunity to consider the alternatives, the intensity of public demands, and the need for compromise. Once the legislature reaches an accommodation, the role of the electorate in the permissive referendum is restricted to accepting or rejecting the compromise. Additionally, the important function of setting

85. Lee, *supra* note 4, at 58.
86. V. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 47 (1967).
87. D. MAGLEBY, *supra* note 5, at 127-28.
88. Lee, *supra* note 4, at 58.
89. *Id.*
90. D. MAGLEBY, *supra* note 5, at 8-9.
91. *Id.*
92. *Id.* at 10.

the agenda of policy issues is not left to interest groups, but remains in the hands of the legislature or city council. This contrasts with the initiative, which is drafted by interest groups that, without popular participation, set an agenda of their own issues. Popular vote may generate controversy, but the people ultimately will benefit from the social conflict when it inevitably wanes as new issues come to light.[93] Thus, in some situations, a popular vote may be a very effective method of reaching an authoritative resolution of a policy issue.

Although the quality of state and local government recently has improved,[94] the ballot processes are far from obsolete. Dissatisfaction with government and its decisions remains an important impetus for popular participation in the political system. For example, observers of the 1978 Jarvis-Gann tax initiative in California[95] suggest that, in addition to rising residential property taxes, the tax revolt was also the result of a public perception of widespread governmental waste and the failure of state government to provide property tax relief despite a state fiscal surplus.[96]

Additionally, there is little, if any, evidence to suggest that the permissive referendum is likely to be exercised recklessly by the electorate.[97] The process has been invoked on relatively few occasions and generally has involved important and timely issues.[98] Several factors contribute to the infrequent use, including the heavy burden of soliciting sufficient signatures within a limited time, the reluctance of legislators to pass measures that may provoke opposition,[99] and greater satisfaction with the measures enacted by legislators.[100] Thus, the permissive referendum may, indirectly and in a limited way, advance reformist goals by enhancing legislative accountability.

Research in the State of Washington supports the conclusion that

93. *See* L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956).

94. *See* Nice, *Revitalizing the States: A Look at the Record*, 72 NAT'L CIVIC REV. 371 (1983); Reeves, *Look Again at State Capacity: The Old Gray Mare Ain't What She Used To Be*, 16 AM. REV. PUB. AD. 74 (1982).

95. CAL. CONST. art. XIIIA.

96. Citrin & Levy, *From 13 to 4 and Beyond: The Political Meaning of the Ongoing Tax Revolt in California*, in THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, at 1, 6-7 (G. Kaufman & K. Rosen eds. 1981). For a summary of the causes of the tax revolt, see Sigelman, Lowery & Smith, *The Tax Revolt: A Comparative State Analysis*, 36 W. POL. Q. 30 (1983).

97. Nor has the fear that the initiative would be used to enact statutes detrimental to property interests been borne out in practice. Bone & Benedict, *supra* note 42, at 348.

98. A review of statewide measures referred by petition since 1960, *see supra* note 31, reveals that referenda have concerned taxes, reapportionment, obscenity, alcohol control, voter registration, and open housing.

99. Price, *supra* note 10, at 245.

100. Bone & Benedict, *supra* note 42, at 338.

the permissive referendum has not been exercised in an unreasonable fashion; only twenty-eight petition referenda reached the ballot between 1914 and 1973.[101] Referenda have been substantially more successful than initiatives at qualifying for the ballot in Washington, with seventy-seven percent of all referendum petitions qualifying as compared to twenty-four percent of all initiatives over the same period of time.[102] Summarizing the Washington experience, Professors Bone and Benedict observed:

> Although less used than the initiative, the referendum has been an important instrument of popular control. The electorate has defeated some referred measures—especially governmental and technical questions which seemed in the overall interest. But numerous private bills dubbed by many legislatures as "bad legislation" were also turned down by the voters. During the last three decades the legislature has seemed more reluctant to pass bills which might invite the mobilization of a referendum effort.[103]

Because use of the permissive referendum has been so limited, the device presents no serious danger of undermining the authority of the legislature or of impairing its ability to function. In fact, research based upon state initiative proposals discloses that the process has had little impact on the degree of legislative innovation.[104] Furthermore, those states that have an initiative process are, surprisingly, far more likely than noninitiative states to have a two-party system.[105]

Finally, although these conclusions are based on experience with statewide ballot measures, they probably are equally applicable to local referenda. Differences in the size, composition, and volatility of local electors may have either a positive or a negative influence on the efficacy of the ballot as a decision-making device. Even with this caveat, there appears to be little danger of the permissive referendum overriding the traditional law-making processes.

Legislative Declarations of Emergency: The Rule of Judicial Deference

One of the keys to analyzing the public safety exception is to disentangle it from the conclusive emergency rule, which is a rule of construction for determining the effective date of legislation in cases of emergency. Although the conclusive emergency rule differs from the

101. *Id.* at 337.
102. *Id.*
103. *Id.* at 348.
104. Price, *supra* note 10, at 258-62.
105. *Id.* at 255.

public safety exception both in purpose and effect, many courts have applied the rule in construing public safety exceptions to permissive referenda. Application of the conclusive emergency rule has exerted a conservative influence on the interpretation of public safety clauses, effectively placing them beyond the reach of judicial review. In order to understand the relationship between the conclusive emergency rule and the public safety exception, this section presents a brief summary of the conclusive emergency rule and its origin.

At common law, an enactment of Parliament was deemed effective as of the first day of the session during which the measure was adopted.[106] Palpable evils arising from this retroactive application of legislation[107] led Parliament in 1793 to provide that an act was effective on the date it received royal assent, unless otherwise provided in the act.[108] In the United States, the rule against retroactive legislation was elevated to a constitutional limitation on legislative power at the state and federal levels.[109] Consequently, with few exceptions, an act of Congress takes effect on the date of its passage, absent an express contrary provision.[110]

The effective date of a state statute usually depends upon either an express constitutional provision or a statutory effective date. Most states delay effectiveness for sixty or ninety days following the adjournment of the legislative assembly or until a certain date following the adjournment.[111] Many jurisdictions prescribe a similar waiting period for municipal ordinances.[112] The delay between the passage of a law and its effective date offers the public the opportunity to inform itself of the new

106. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 222 (7th ed. 1903).

107. *See* Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 779-80 (1936). Blackstone observed that "[a]ll laws should be therefore made to commence *in futuro*, and be notified before their commencement...." 1 W. BLACKSTONE, COMMENTARIES *46.

108. An Act to Prevent Acts of Parliament From Taking Effect From Time Prior to the Passing Thereof, 33 Geo. 3, ch. 13 (1793).

109. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 397 (1798); Smead, *supra* note 107, at 780-81.

110. Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822); United States v. Gavrilovic, 551 F.2d 1099, 1103 (8th Cir. 1977); *see also* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 104, at 124 (1st ed. 1891) ("When no other time is fixed a statute takes effect from the date of its passage—from the date of the last act necessary to complete the process of legislation and to give a bill the force of law." (footnote omitted)).

111. Typical effective dates are June 1 or July 1. For a list of the effective dates in various states, see 2 J. SUTHERLAND, *supra* note 110, § 33.02, at 2 n.1 (4th ed. 1973).

112. 5 MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 15.39, at 110 (3d ed. 1981).

law and to alter its behavior accordingly.[113]

Most state constitutions provide that, when emergency action must be taken, the legislature may circumvent the grace period and declare the law effective immediately upon its passage. Some state assemblies possess this power without limitation.[114] Other constitutions, however, provide that acts are effective immediately only upon a legislative declaration of emergency.[115] For example, the Illinois Constitution of 1848 postponed the effective date of a statute "unless in case of emergency the general assembly shall otherwise direct."[116] The early constitutions of Nebraska,[117] Oregon,[118] and South Dakota[119] had similar provisions.[120]

Although an emergency has been defined as "an unforeseen combination of circumstances which calls for immediate action,"[121] courts have held that the purpose of the clause is only to determine when the act takes effect[122] and have demanded no more than a legislative finding of convenience.[123] Moreover, courts traditionally have left this matter solely in the hands of the enacting body and generally have refused to

113. Wheeler v. Chubbuck, 16 Ill. 361, 362 (1855); Price v. Hopkins, 13 Mich. 318, 325 (1865); City of Roanoke v. Elliot, 123 Va. 393, 401, 96 S.E. 819, 822 (1918).

114. *E.g.*, COLO. CONST. art. V, § 19; FLA. CONST. art. III, § 19; MISS. CONST. art IV, § 75.

115. *See, e.g.*, IDAHO CONST. art. III, § 22; OR. CONST. art. IV, § 28; S.D. CONST. art. III, § 22. Failure to include the clause in the statute will nullify its expedited effective date, V-1 Oil Co. v. State Tax Comm'n, 98 Idaho 140, 143, 559 P.2d 756, 759 (1977), and a void emergency declaration simply postpones the effective date to that of any other nonemergency measure. *Cf.* McIntosh v. State, 56 Tex. Crim. 134, 137, 120 S.W. 455, 457 (1909) (no error in passing an act by less than four-fifths of legislature under an emergency clause because enforcement did not occur until 90 days after adjournment of the legislature).

116. ILL. CONST. of 1848, art. III, § 23.

117. NEB. CONST. of 1875, art. III, § 27.

118. OR. CONST. of 1857, art. IV, § 28.

119. S.D. CONST. of 1889, art. III, § 22.

120. For a complete listing of such constitutional provisions, see *Emergency Legislation*, *supra* note 36, at 851 & nn.5-11.

121. Garvey v. Trew, 64 Ariz. 342, 354, 170 P.2d 845, 853, *cert. denied*, 329 U.S. 784 (1946); Hatfield v. Meers, 402 S.W.2d 35, 39 (Mo. Ct. App. 1966); Culhane v. Equitable Life Assurance Soc'y, 65 S.D. 337, 342, 274 N.W. 315, 318 (1937); State *ex rel.* Gray v. Martin, 29 Wash. 2d 799, 806, 189 P.2d 637, 641 (1948). An emergency doctrine is recognized in many other areas of the law. *E.g.*, Ingalls Ship Bldg. Corp. v. Holcomb, 217 So. 2d 18, 20-21 (Miss. 1968) (emergency medical exception to workers' compensation statute); Perez v. State, 514 S.W.2d 748, 749 (Tex. Crim. App. 1974) (warrantless search due to exigent circumstances); Roberts v. Knorr, 260 Wis. 288, 291, 50 N.W.2d 374, 376 (1951) (inaction of innocent driver excused by sudden emergency).

122. Barber v. State, 206 Ark. 187, 190, 174 S.W.2d 545, 546 (1943); Huntsville Indep. School Dist. v. McAdams, 217 S.W.2d 51, 54 (Tex. Civ. App.), *rev'd on other grounds*, 148 Tex. 120, 221 S.W.2d 546 (1949).

123. *See infra* note 138.

overturn a legislative declaration of emergency.[124] In *Biggs v. McBride*,[125] for example, the Oregon Supreme Court held that

> it is for the legislature to ascertain and declare the fact of the existence of the emergency, and its determination is not reviewable elsewhere. The constitution has vested the law-making department of the government with the power to determine that question . . . , and such determination is not made reviewable in the courts.[126]

Although the *Biggs* court did require the assembly to make some statement of emergency circumstances in the act, it held that the legislative declaration that the proposed act "would greatly tend to benefit the people of this state" was sufficient.[127]

Biggs illustrates the application of the conclusive emergency rule. The rule manifests judicial deference to the legislature's decision to expedite the effective dates of statutes merely as a matter of convenience[128] rather than in response to true emergency circumstances. This rule may be compelled by specific language in a state constitution that confers upon the legislative branch the authority to accelerate a statute's effective date by "directing" or "declaring" the existence of an emergency. There is considerable merit to such a rule.[129] A body with the power to enact a

124. *See* Wheeler v. Chubbuck, 16 Ill. 361, 362-63 (1855); Carpenter v. Montgomery, 7 Blackf. 415, 416 (Ind. 1845). Indeed, a legal encyclopedia of the time stated that "the legislature is the sole judge as to whether an emergency exists, and its declaration is not open to question by the courts." 36 CYCLOPEDIA OF LAW AND PROCEDURE 1193-94 (1910).

125. 17 Or. 640, 21 P. 878 (1889). The *Biggs* case is of special note because the Oregon Supreme Court relied on it in the seminal public safety exception case of Kadderly v. Portland, 44 Or. 118, 74 P. 710 (1903). The Oregon Constitution provided that acts take effect 90 days after the end of the session, "except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law." OR. CONST. of 1857, art. IV, § 28. The act at issue established the office and salary for railroad commissioners. A state officer refused to pay the commissioners' salaries on the grounds that no emergency was declared in the body of the act and thus it was not immediately effective. *Biggs*, 17 Or. at 643, 21 P. at 879. The court was skeptical of the legislature's "emergency" delcaration, *id.* at 647, 21 P. at 880, but refused to consider its merits.

126. *Biggs*, 17 Or. at 647, 21 P. at 880.

127. *Id.* The court justified its holding by noting the limits of judicial authority: "Such determination is in its nature political, and not judicial, and for such errors, if they be errors, the remedy must be found in the virtue and intelligence of the people. The ballot-box is the medium through which they may be corrected." *Id.* at 647-48, 21 P. at 880.

128. *See* Molesworth v. Secretary of the Commonwealth, 347 Mass. 47, 51, 196 N.E.2d 312, 315 (1964) ("The term 'emergency,' under the Massachusetts constitutional provision, thus has a somewhat artificial and unnatural meaning, for most members of the public probably would not regard the needs of mere 'public convenience' as giving rise to a true 'emergency.' "); Prescott v. Secretary of the Commonwealth, 299 Mass. 191, 200, 12 N.E.2d 462, 467 (1938) ("[N]ecessities of 'public . . . convenience' . . . justify a declaration of an emergency . . . . [T]he Legislature [must] have wide discretion in declaring the existence of an emergency.").

129. The conclusive emergency rule remains intact in several nonreferenda jurisdictions at

law should possess the concomitant power to direct when that law takes effect.[130] The rule removes the possibility of confusion regarding the effective date of a statute, which contributes to the certainty of law and conserves judicial resources that would otherwise be expended in litigating that issue. Finally, the effective date of a statute is essentially a question of legislative procedure, and courts generally have declined to invalidate a statute because of an alleged procedural defect in its enacting process.[131]

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both the state level, *e.g.*, Diaz Cintron v. Puerto Rico, 24 F.2d 957, 959 (1st Cir. 1928); Hill v. Taylor, 264 Ky. 708, 716-17, 95 S.W.2d 566, 570 (1936); Breckinbridge v. County School Bd., 146 Va. 1, 4, 135 S.E. 693, 694-95 (1926), and the local level, *e.g.*, State *ex rel.* Skillman v. City of Miami, 101 Fla. 585, 589, 134 So. 541, 543 (1931); Breland v. City of Bogalusa, 51 So. 2d 342, 345 (La. Ct. App. 1951); Artcarved Class Rings, Inc. v. City of Austin, 551 S.W.2d 788, 791 (Tex. Civ. App. 1977).

130. Some states require a two-thirds vote of all the members to pass an emergency measure. *E.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(3); CAL. CONST. art. IV, § 8; ME. CONST. art. IV, pt. 3, § 16; MO. CONST. art. III, § 29; NEB. CONST. art. III, § 27; N.D. CONST. art. IV, § 41; OHIO CONST. art. II, § 1d; OKLA. CONST. art. V, § 58; S.D. CONST. art. III, § 22; TEX. CONST. art. III, § 39; WASH. CONST. art. II, § 31; W. VA. CONST. art. VI, § 30; *see also* MD. CONST. art. XVI, § 2 (three-fifths vote); VA. CONST. art. IV, § 13 (four-fifths vote).

Some of the apparent capriciousness of the rule is ameliorated by requiring the consent of a super-majority of the legislature and a statement of the reasons for the emergency declaration. Some states require that the emergency be expressed or declared in the preamble or the body of the act. *E.g.*, IDAHO CONST. art. III, § 22; IND. CONST. art. IV, § 28; N.D. CONST. art. IV, § 41; OR. CONST. art. IV, § 28; S.D. CONST. art. III, § 22; TEX. CONST. art. III, § 39; VA. CONST. art. IV, § 13. Others require a statement of facts supporting the declaration. *E.g.*, ARIZ. CONST. art. IV, pt. 1, § 1(3); CAL. CONST. art. IV, § 8; ME. CONST. art. IV, pt. 3, § 16; OHIO CONST. art. II, § 1d; *see also* McCray v. City of Boulder, 165 Colo. 383, 386-87, 439 P.2d 350, 352-53 (1968) (city charter requires statement in city ordinance). Although courts agree that one of the purposes of a statement is to restrain legislative abuse of emergency declarations, *see* Gentry v. Harrison, 194 Ark. 916, 920-21, 110 S.W.2d 497, 501 (1937) (Prior to amending the Arkansas Constitution to require a statement, the emergency clause was attached to almost all laws enacted.); Graham v. Dye, 308 Ill. 283, 287, 139 N.E. 390, 391 (1923) (An emergency statute must contain a statement because Illinois Constitution does not authorize passage of an emergency statute unless the immediate enactment is important, if not necessary, to accomplish its purpose.); Payne v. Graham, 118 Me. 251, 255, 107 A. 709, 710 (1919) (constitutional requirement of emergency statement creates a limitation on legislative power); Goodman v. Youngstown, 24 Ohio L. Abs. 696, 702 (1937) ("The mere statement that the ordinance is necessary . . . is but a conclusion of the council."), the statement, once made, is rather perfunctory. *See* Morris v. Goss, 147 Me. 89, 91-92, 83 A.2d 556, 563 (1951) (Ultimate facts, such as that existing revenue of the state was insufficient to meet needs of the state, were sufficient.); Molesworth v. Secretary of the Commonwealth, 347 Mass. 47, 59, 196 N.E.2d 312, 320 (1964) (statement that delay in effective date would tend to defeat purpose of act held sufficient); Greenberg v. Lee, 196 Or. 157, 183, 248 P.2d 324, 335 (1952) ("[P]rotracted narration of factual detail" is not required.).

131. When a bill is passed in the appropriate form by both houses of the legislature and is signed by the presiding officer of each house, it is referred to as an enrolled bill, 1 J. SUTHERLAND, *supra* note 110, § 15.01, at 407, and becomes law upon receiving the assent of the governor. *Id.* § 16.02, at 434. If an enrolled bill has no defects on its face with respect to its enactment, a substantial number of courts refuse to consider extrinsic evidence to prove that

The conclusive emergency rule already was firmly in place when the Progressive movement swept across the nation and brought the permissive referendum amendments to many state constitutions. These amendments were limited to acts other than those necessary for the immediate preservation of public peace, health, or safety. Although the public safety exception appeared to address crises and disasters, it was not clear whether courts would construe public safety exceptions with the same deference accorded to emergency declarations. The older conclusive emergency clause had virtually no limits and surely was not restricted in practice to actual emergencies. Would courts protect the referendum process from legislative encroachment by strictly construing public safety declarations? Little time elapsed before the first courts wrestled with the issue and set the tone for the exercise of permissive referendum powers for the remainder of the century.[132]

Early Judicial Responses to the Public Safety Exception

The *Kadderly* Rule

The first state to adopt the permissive referendum in its constitution was South Dakota in 1898.[133] The constitutional amendment excepted laws "necessary for the immediate preservation of the public peace,

the bill was not lawfully enacted. *Id.* § 15.03, at 410; *see* Wilmington Sav. Fund Soc'y v. Green, 288 A.2d 273 (Del. Super. Ct. 1972); State *ex rel.* Bugge v. Martin, 38 Wash. 2d 834, 840-41, 232 P.2d 833, 836-37 (1951). For example, several courts have refused to question a suspension by the legislature of a rule requiring the reading of a bill on three separate days. People *ex rel.* Scearce v. County of Glenn, 100 Cal. 419, 421-22, 35 P. 302, 303 (1893); Weyand v. Stover, 35 Kan. 545, 551-52, 11 P. 355, 359 (1886); Hall v. Miller, 4 Neb. 503, 506-07 (1876); Day Land & Cattle Co. v. Texas, 68 Tex. 526, 543 (1867). Courts defend this rule on the same grounds used to justify conclusive emergency declarations:

> [T]he evils attending uncertainty in ascertaining the statutory laws of the state would far out-weigh any benefits which might be obtained by permitting an impeachment of the authentication of an act. If the members of the General Assembly violate their constitutional duties on adjournment, they can be defeated the next time such offices come up for election, but the remedy is not with the courts.

State *ex rel.* Cline v. Schricker, 228 Ind. 41, 48, 88 N.E.2d 746, 748-49 (1949). Courts that do consider extrinsic evidence limit the inquiry to those cases in which it affirmatively appears in the journal records that the procedural requirements have not been met, 1 J. SUTHERLAND, *supra* note 110, § 15.04, at 414, or to those cases in which the presumption of validity is overcome by clear and convincing evidence. *Id.* § 15.06, at 416; *see* D & W Auto Supply v. Department of Revenue, 602 S.W.2d 420, 424-25 (Ky. 1980).

132. Part of the problem has been one of semantics, with courts using the term "emergency" to describe both an effective date clause and an act immediately necessary for public welfare. The leading case that is favorable to the referendum makes this mistake. State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 318, 147 P. 11, 16-17 (1915).

133. S.D. CONST. art. III, § 1.

health or safety . . . ."[134] It also left undisturbed the state constitution's emergency legislation provision.[135] The permissive referendum amendment made no reference to emergency acts or to the legislative authority to declare them.[136] Following South Dakota, Utah[137] and Oregon[138] adopted the ballot process in 1900 and 1902, respectively. The Oregon amendment included a public safety exception expressed in the same language as the South Dakota provision: "The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petitions signed by 5% of the legal voters, or by the legislative assembly, as other bills are enacted."[139] As in the case of South Dakota, the Oregon amendment did not change the emergency provision of the Oregon Constitution, which provided that statutes become effective ninety days after the end of the session, absent an emergency declaration.[140]

The emergency clauses thus conflicted with the public safety clauses in both constitutions.[141] In both the Oregon and South Dakota amendments, the public safety exception restricts the referendum power without stating which branch of government is vested with the authority to determine whether an act is immediately necessary for public welfare, or how the power shall be exercised. The older emergency provision, on the other hand, vested the power in the legislature to be exercised by "declaring" an emergency[142] or by "directing" an expedited effective date.[143] In South Dakota, a two-thirds vote of the assembly is required to declare an

134. *Id.*

135. It provides that statutes go into effect 90 days after the end of the legislative session, "unless in case of emergency, (to be expressed in the preamble or body of the act) the Legislature shall by a vote of two-thirds . . . otherwise direct." *Id.* § 22.

136. *Id.* § 1.

137. The Utah Constitution of 1895 provided for a 60-day waiting period unless the legislature directed otherwise by two-thirds vote. UTAH CONST. of 1895, art. VI, § 25. No declaration of emergency was required. By the terms of the amendment of 1900, the referendum may be exercised against any measure that is not adopted by a two-thirds majority. UTAH CONST. art. VI, § 1. In short, Utah has adopted a legislative referendum.

138. OR. CONST. art. IV, § 1.

139. *Id.*

140. The provision states that "[n]o act shall take effect, until ninety days from the end of the session . . . except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law." *Id.* § 28.

141. In South Dakota, the clauses are harmonized insofar as the deadline for filing a referendum petition—90 days after the end of the legislative session, S.D. CODIFIED LAWS ANN. § 2-1-4 (1980)—corresponds to the effective date of the act under the state constitution. S.D. CONST. art. III, § 22. The Oregon amendment also prescribes a 90-day deadline that matches the effective date clause. OR. CONST. art. IV, § 28.

142. OR. CONST. art. IV, § 28.

143. S.D. CONST. art. III, § 22.

emergency,[144] but the amendment is silent with respect to the number of votes required to pass a public safety measure.[145]

Before another state joined the ranks,[146] the South Dakota Supreme Court, in *State ex rel. Lavin v. Bacon*,[147] and the Oregon Supreme Court, in *Kadderly v. Portland*,[148] had the opportunity to reconcile the conflict between the two provisions. *Lavin* was an action in quo warranto to determine title to membership on a state board of charities and corrections in view of a 1901 act that contained a hybrid public safety and emergency declaration[149] and had the effect of ousting the existing membership in favor of a newly appointed board. In *Kadderly*, the dispute arose when the city council of Portland authorized the reassessment of plaintiff's land to determine his proportionate share of the cost of street improvements. The reassessment was made pursuant to a state statute that had become immediately effective under an emergency clause.[150]

In *Lavin* and *Kadderly* the complaining parties sought to have the statute in question declared invalid on the ground that it was not necessary for the immediate preservation of public peace, health, or safety under the terms of the referendum amendment and thus could not take effect immediately.[151] Neither case, however, presented a confrontation between the legislative determination of public safety and the people's

144. *Id.*

145. *Id.* § 1.

146. Nevada was the next state to adopt a public safety exception in 1904, after the amendment passed the legislature in 1901 and 1903. 1901 Nev. Stat. 139 (codified at NEV. CONST. art. XIX, § 1).

147. 14 S.D. 394, 85 N.W. 605 (1901).

148. 44 Or. 118, 74 P. 710 (1903).

149. Section 3 of the act provided:

> Whereas, there is no law limiting the term of office of appointees . . . the enactment of the foregoing provision is necessary for the immediate preservation and support of the existing public institutions of this state, and an emergency is hereby declared to exist and this act shall take effect and be in force immediately upon its passage and approval.

Lavin, 14 S.D. at 400, 85 N.W. at 606.

150. Section 427 of the act provided in part:

> Whereas there are several bridges upon important thoroughfares and car lines in the City of Portland, now old and in a dilapidated and ruinous condition, dangerous to life and property; and whereas there is an immediate necessity for the construction of new bridges in the place of said old ones, in order to provide for the safety of the people of said city . . . and whereas there is otherwise a necessity for the immediate adoption of the foregoing act to insure the health, peace, and safety of the people of Portland, therefore, this act shall take effect and be in force from and after its approval by the Governor.

Kadderly, 44 Or. at 123-24, 74 P. at 712.

151. *Id.* at 128-29, 74 P. at 714; *Lavin*, 14 S.D. at 400, 85 N.W. at 606.

exercise or attempted exercise of the referendum. Rather, the central issue in both cases was the effective date of the statute.

Neither court took the opportunity to second-guess the legislative determination. Each applied the old conclusive emergency rule, recast in terms of public safety, and held that the question of whether a law is in fact necessary for the immediate preservation of public peace, health, or safety is for the legislature alone to judge and its determination is conclusive and final.[152] An oft-quoted passage from the *Kadderly* opinion rationalizes the results:

> But, it is argued, what remedy will the people have if the legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated? The obvious answer is that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision of the highest court in a case over which it has jurisdiction. Nor should it be supposed that the legislature will disregard its duty, or fail to observe the mandates of the constitution. The courts have no more right to distrust the legislature than it has to distrust the courts. The constitution has wisely divided the government into three separate and distinct departments, and has provided that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the constitution expressly provided .... It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one coordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people, and must be found, as said by Mr. Justice Strahan in *Biggs v. McBride*, ... in the ballot box.[153]

A conclusive declaration is tantamount to granting the legislature the power to prevent a referendum merely by inserting an emergency declaration, regardless of whether an actual crisis exists. The impact of this construction cannot be over-emphasized. Two recent cases, both involving municipal ordinances, illustrate the point. In an Oklahoma decision,[154] plaintiffs challenged a referendum petition directed at an ordinance closing a public street on the ground that the ordinance contained an emergency clause.[155] The Oklahoma Supreme Court held that the determination of an emergency was exclusively a legislative function and conclusive in judicial proceedings, and therefore the challenged ordi-

152. *Kadderly*, 44 Or. at 149-50, 74 P. at 721; *Lavin*, 14 S.D. at 405, 85 N.W. at 608.

153. *Kadderly*, 44 Or. at 150, 74 P. at 721 (citation omitted).

154. *In re* Supreme Court Referendum Petition, 530 P.2d 120, 121 (Okla. 1974).

155. *Id.*

nance was not subject to the referendum process.[156] Similarly, the Ohio Supreme Court applied the conclusive rule to a public safety declaration in an ordinance authorizing the construction of a sewage disposal system.[157] After citizens petitioned for the referral of the measure, the governing council repealed the ordinance and enacted a new one with the same language plus a public safety declaration. Citing the conclusive rule, the court refused to review the declaration.[158]

156. *Id.* at 121.

157. State *ex rel.* Tester v. Board of Elections, 174 Ohio St. 15, 17, 185 N.E.2d 762, 763 (1962).

158. *Id.* at 17, 185 N.E.2d at 763; *see also* State v. Kizak, 15 Ohio St. 2d 27, 28-29, 238 N.E.2d 777, 778-79 (1968) (ordinance reciting that immediate municipal income tax was necessary to generate revenue complied with statutory requirement that reasons for emergency be set forth). In addition to Oregon, the states of Arizona, Colorado, Ohio, and Oklahoma will not review a finding of public safety even though a referendum is at stake.

For cases following the *Kadderly* rule in Oregon, see Greenberg v. Lee, 196 Or. 157, 166, 248 P.2d 324, 328 (1952); Roy v. Beveridge, 125 Or. 92, 96-97, 266 P. 230, 232 (1928); Cameron v. Stevens, 121 Or. 538, 544, 256 P. 395, 397 (1927); Thielke v. Albee, 79 Or. 48, 53, 153 P. 793, 795 (1915); Bennett Trust Co. v. Sengstacken, 58 Or. 333, 343, 113 P. 863, 867 (1911). *But see* Joplin v. Ten Brook, 124 Or. 36, 40, 263 P. 893, 895 (1928) (declaration struck down as obviously false).

Arizona cases include: City of Phoenix v. Landrum & Mills Realty, 71 Ariz. 382, 387, 227 P.2d 1011, 1013-14 (1951); Orme v. Salt River Valley Water Users' Ass'n, 25 Ariz. 324, 347-48, 217 P. 935, 943 (1923).

Colorado cases include: Lyman v. Town of Bow Mar, 188 Colo. 216, 229, 533 P.2d 1129, 1137 (1975) (en banc); Shields v. City of Loveland, 74 Colo. 27, 31, 218 P. 913, 915 (1923); Van Kleeck v. Ramer, 62 Colo. 27, 31, 156 P. 1108, 1110-11 (1916) (en banc); *In re* Senate Resolution No. 4, 54 Colo. 262, 270-71, 130 P. 333, 336 (1913) (per curiam).

Ohio cases include: State *ex rel.* City of Fostoria v. King, 154 Ohio St. 213, 220-21, 94 N.E.2d 697, 701 (1950); State *ex rel.* Schorr v. Kennedy, 132 Ohio St. 510, 517, 9 N.E.2d 278, 280-81 (1937); State *ex rel.* Durbin v. Smith, 102 Ohio St. 591, 604-06, 133 N.E. 457, 460-61 (1921). *But see* Walsh v. Cincinnati City Council, 54 Ohio App. 2d 107, 111-12, 375 N.E.2d 811, 814-15 (1977) (striking down obviously illusory declaration in city ordinance).

For Oklahoma cases, see *In re* Supreme Court Referendum Petition, 530 P.2d 120, 121 (Okla. 1974); *In re* Referendum Petition No. 1, 182 Okla. 419, 422, 77 P.2d 1152, 1154-55 (1938); *In re* Menefee, 3 Okla. 365, 375, 97 P. 1014, 1018 (1908); Oklahoma City v. Shields, 3 Okla. 265, 303, 100 P. 559, 576 (1908). *But see* Riley v. Carico, 27 Okla. 33, 37, 110 P. 738, 740 (1910) (An act that puts a 10-year lien on land cannot be put into immediate effect.).

Arkansas also followed the *Kadderly* rule prior to joining the ranks of those states that subject public safety legislation to the permissive referendum without suspending the act pending the election. *See* Hanson v. Hodges, 109 Ark. 479, 490, 160 S.W. 392, 395 (1913); Arkansas Tax Comm'n v. Moore, 103 Ark. 48, 54, 145 S.W. 199, 202 (1912).

California, Maine, and South Dakota allow only limited review of legislative declarations of public safety in referendum cases. *See, e.g.*, Davis v. County of Los Angeles, 12 Cal. 2d 412, 422, 84 P.2d 1034, 1040 (1938); Behneman v. Alameda-Contra Costa Transit Dist., 182 Cal. App. 2d 687, 691-92, 6 Cal. Rptr. 382, 385-86 (1960); Hollister v. Kingsbury, 129 Cal. App. 420, 424-25, 18 P.2d 1006, 1008 (1933); Morris v. Goss, 147 Me. 89, 98, 83 A.2d 556, 561 (1951); Hodges v. Snyder, 43 S.D. 166, 175, 178 N.W. 575, 577-78 (1920).

Prior to joining the nine states subjecting public safety acts to the permissive referendum without suspending the act pending the election, Michigan and Montana followed the *Brislawn*

The *Brislawn* Rule

While *Kadderly*[159] and its progeny articulate the majority rule among those states considering the issue, several cases recognize the distinction between emergency clauses for the purpose of making an act immediately effective and declarations of public safety intended to insulate the act from the referendum. The leading case is *State ex rel. Brislawn v. Meath*,[160] decided twelve years after *Kadderly* and three years after the State of Washington adopted the initiative and referendum in 1912. *Brislawn* reached a different result even though, like *Lavin*[161] and *Kadderly*, it was an effective date case and not a referendum case. In *Brislawn*, the parties sought to determine who had the right to membership on a state board of land commissioners under a legislative act that ousted one group of members and substituted another. The act further provided that it was "necessary for the immediate preservation of the public peace and safety and the support of the state government, and shall take effect immediately."[162]

The *Brislawn* court reasoned that the public safety exception for permissive referenda had greater legal significance than the legislative prerogative regarding the effective date of a law.[163] In the majority's view, the latter constitutional provision had been emasculated by judicial construction and "was, in legal effect . . . as barren as if no words had been written after the section number."[164] The referendum exception, on the other hand, "fixed a limit beyond which the legislature [could not] go without doing violence to the will and voice of the people."[165] Thus, the

rule. State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 318, 147 P. 11, 16-17 (1915); *see* Attorney General *ex rel.* Barbour v. Lindsay, 178 Mich. 524, 539, 145 N.W. 98, 103 (1914); State *ex rel.* Goodman v. Stewart, 57 Mont. 144, 165, 187 P. 641, 648 (1920).

159. Kadderly v. Portland, 44 Or. 118, 74 P. 710 (1903); *see supra* notes 148-53 & accompanying text.

160. 84 Wash. 302, 147 P. 11 (1915).

161. State *ex rel.* Lavin v. Bacon, 14 S.D. 394, 85 N.W. 605 (1901); *see supra* notes 147-52 & accompanying text.

162. *Brislawn*, 84 Wash. at 304, 147 P. at 12.

163. At the outset of the opinion, Judge Chadwick compared the *Kadderly* rule with the established doctrine that courts have the power to declare laws unconstitutional:

> There has been a wide inconsistency in the holding of the courts upon constitutional questions. They have declared that, where the legislature has said there is an emergency, although undefined, its declaration is final and conclusive upon all. At the same time, and in the same day, they have not hesitated to declare acts of the legislature to be in derogation of the fundamental law or some of the legislative limitations of the constitution.

Id. at 307, 147 P. at 13.

164. *Id.* at 310, 147 P. at 14.

165. *Id.*

court reasoned that the exception is a limitation of power that is subject to judicial scrutiny. Because the act in question was "in truth and in fact"[166] not necessary for the immediate preservation of public peace, health, or safety, a closely divided court voided the public safety clause and held that the act would take effect ninety days after the adjournment of the legislature.[167]

Courts adopting the *Kadderly* rule, said the majority, were "in step with a tune that is dead."[168] According to *Brislawn*, the rule should be that

> the referendum cannot be withheld by the legislature in any case except it be where the act touches the immediate preservation of the public peace, health, or safety, or the act is for the financial support of the government and the public institutions of the state, that is, appropriation bills. If the act be doubtful, the question of emergency will be treated as a legislative question, and the doubt resolved in favor of the declaration of emergency made by the legislative body.
>
> Emergency, in the sense of the present constitution, does not mean expediency, convenience or best interest. There is no room for construction or speculation. The declaration is equivalent to saying that the referendum shall not be cut off in any case except in certain enumerated instances, none of which now occur.[169]

A majority of the Washington Supreme Court could not in good conscience ignore the claims of the referendum right and the case thus marked a retreat from earlier judicial deference.

A recent example of the application of the *Brislawn* rule is *State ex rel. Humiston v. Meyers*.[170] The Supreme Court of Washington granted a writ of mandamus compelling a referendum against a statute enacted to regulate the maintenance and operation of bingo and other forms of gaming devices. The court was unconvinced that pinball machines, punchboards, bingo, and card rooms were an immediate threat to the populace.[171] The majority concluded that neither the act itself nor matters of which the court takes judicial notice "indicate a situation justifying the inclusion of an emergency clause."[172] The *Brislawn* rule remains

166. *Id.* at 306, 147 P. at 12.

167. *Id.* at 323, 147 P. at 18.

168. *Id.* at 319, 147 P. at 17.

169. *Id.* at 318, 147 P. at 16-17.

170. 61 Wash. 2d 772, 380 P.2d 735 (1963). For other Washington cases, see State *ex rel.* Gray v. Martin, 29 Wash. 2d 799, 803, 189 P.2d 637, 639 (1948); State *ex rel.* Kennedy v. Reeves, 22 Wash. 2d 677, 682, 157 P.2d 721, 723-24 (1945); State *ex rel.* Satterthwaite v. Hinkle, 152 Wash. 221, 225, 277 P. 837, 839 (1929).

171. *Meyers*, 61 Wash. 2d at 780, 380 P.2d at 740.

172. *Id.* The courts of Missouri and New Mexico also will review a finding of public safety and order a referendum if the measure fails to fall within the ambit of the exception. *See* Inter-City Fire Protection Dist. v. Gambrell, 360 Mo. 924, 934, 231 S.W.2d 193, 199 (1950); Heinkel

a viable alternative to *Kadderly*. The following section discusses which of these approaches is more consistent with existing doctrine.

The Proper Role of the Judiciary in Construing the Public Safety Exception

Before treading upon the "most delicate balance between the emergent powers of the legislature and the people's right of referendum,"[173] a court must first determine whether the issue of a legislative public safety declaration is beyond the scope of judicial inquiry. Although a court's power to declare an enactment void because it conflicts with the written constitution of the state is fundamental to American jurisprudence,[174] the reach of judicial power is not limitless. Courts generally have refused to decide issues that are uniquely political and therefore unsuited for judicial resolution. The political question doctrine holds that certain decisions of the legislative and executive branches of government are nonjusticiable.[175] Several theories have been posited to explain the origin of the doctrine, its nature, its application, and to identify some guidelines that control its use.[176] In 1962, the Supreme Court in *Baker v. Carr*[177] set forth the factors to be considered in determining whether a given issue is nonjusticiable. The Court stated:

> Prominent on the surface of any case held to involve a political question is found textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various de-

v. Toberman, 360 Mo. 58, 70, 226 S.W.2d 1012, 1016-17 (1950); State *ex rel.* Pollock v. Becker, 289 Mo. 660, 679-80, 233 S.W. 641, 649 (1921); State *ex rel.* Westhues v. Sullivan, 283 Mo. 546, 591, 224 S.W. 327, 338-39 (1920); Otto v. Buck, 61 N.M. 123, 127-28, 295 P.2d 1028, 1031-32 (1956); State *ex rel.* Hughes v. Cleveland, 47 N.M. 230, 235-36, 141 P.2d 192, 196-97 (1943); Todd v. Tierney, 38 N.M. 15, 24, 27 P.2d 991, 997 (1933).

173. State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 777, 380 P.2d 735, 738 (1963).

174. *See* Kamper v. Hawkins, 3 Va. (1 Brock) 20, 32 (1793). *See generally* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166 (1972) (tracing the history and development of the doctrine of judicial review).

175. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 109 (2d ed. 1983).

176. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962); Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

177. 369 U.S. 186 (1962).

partments on one question.[178]

At first blush, the political question doctrine appears applicable to disputes concerning the constitutionality of legislative action barring the referendum process. In fact, in those jurisdictions giving conclusive effect to legislative pronouncements of emergency, judicial deference is often justified with several of the criteria listed in *Baker*.

The first factor enunciated by the Supreme Court in *Baker*—whether there is a textually demonstrable constitutional commitment of the issue to a coordinate branch—seems to have played a significant role in the much earlier *Kadderly* opinion. Courts that follow *Kadderly* construe the public safety exception together with an emergency effective date provision and interpret the former in light of the latter's textual commitment to the legislative branch. The court in *Kadderly* noted that

> the Constitution of Oregon . . . *giving the legislative assembly power to put any law into force upon approval by declaring an emergency*, has been modified by the amendment of 1902, so as to exclude from the power to declare an emergency all laws except those necessary for the immediate preservation of the public peace, health, or safety.[179]

By defining the public safety exception as a term that narrowed the scope of the emergency declaration provision, the question of whether a legislative finding of public safety is subject to judicial review became rhetorical.[180]

The political question doctrine also explains the second theme of the *Kadderly* rule: whether a matter calls for a policy determination of a kind clearly not for judicial discretion. "The laws excepted from the operation of the amendment," according to the *Kadderly* opinion, "do not depend alone upon their character, but upon the necessity for their enactment in order to accomplish certain purposes."[181] The questions of expediency and necessity are not properly judicial questions, but belong to the body that passes upon those issues. As the *Kadderly* court noted, "Most unquestionably, those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine whether a given law is necessary for the preservation of the public peace, health, and safety."[182]

Despite the initial attractiveness of the political question doctrine in this setting, however, a closer look reveals that the public safety excep-

178. *Id.* at 217.
179. *Kadderly*, 44 Or. at 147, 74 P. at 720 (emphasis added).
180. *Id.*
181. *Id.* at 148, 74 P. at 720.
182. *Id.* at 148, 74 P. at 721.

tion is an appropriate subject for judicial adjudication. A court applying the cardinal rules of constitutional construction to permissive referenda must ascertain and give effect to the intent and purpose of both the drafters of the provision and the voters who ratified it.[183] Although judicial deference in the effective date context may be justified, the different purpose underlying the public safety limitation commands a different result.

Contemporaneous statements of intent by the drafters of the public safety exception are difficult to locate. One proponent at the turn of the century did articulate his view of the purpose of the public safety exception:

> As a matter of fact, no law can have for its object the immediate preservation of the public peace, unless it be to prevent invasion, insurrection, or war; no law can have for its object the immediate preservation of the public health, unless it be to prevent the introduction of some plague or the spread of some contagious or infectious disease; and no law can have for its object the immediate preservation of the public safety unless it be to prevent riot or mob violence, or something calculated to bring about great destruction to life or property . . . .
>
> *The people of the state should have the right to avail themselves of the referendum clause in the constitution in all cases except those clearly intended to be embraced within the exceptions quoted.*[184]

The conspicuous absence of this rule from the analysis of the *Kadderly* opinion is deliberate. Such an analysis would steer a course clear of the political question doctrine and support the notion that the safety exception is justiciable.

The *Kadderly* court, in construing the emergent effective date provision and the public safety exception provision as *in pari materia*, concluded that the necessity for invoking the public safety exception should also be determined by the legislature. Although this is a common rule of construction, its application in this case is suspect because the limiting language of the public safety exception is on its face clear and unambiguous and was adopted for a wholly different end.[185] The difference in the purposes of the two clauses is demonstrated by the failure to commit the public safety exception textually to the judgment of the legislative branch.[186] If the proponents of the public safety exception had intended to place the discretion for its exercise in the hands of the assembly, they could have so provided with appropriate language. Such discretion,

183. Board of Supervisors v. Lonergan, 27 Cal. 3d 855, 863, 616 P.2d 802, 806, 167 Cal. Rptr. 820, 824, *cert. denied*, 450 U.S. 918 (1980).

184. J. BARNETT, *supra* note 17, at 136-37 (emphasis added).

185. *See* State v. Di Carlo, 67 N.J. 321, 325, 338 A.2d 809, 811 (1975); J. SUTHERLAND, *supra* note 110, §§ 51.01, .03.

186. *See supra* notes 136-45 & accompanying text.

however, could not be vested rationally in the same body that the referendum process seeks to control.[187] It seems then that the public safety restriction is intended to set off a special class of subject matter in which the legislature, in the best interest of all the people, can operate free from a referendum threat. The emergency effective date provision, on the other hand, is simply a procedural device through which the legislative assembly may expedite the effective date of the statute, rather than a substantive limitation on power.

A question related to the justiciability issue is whether the limiting language of the public safety exception is so broad that it does not afford judicially discoverable standards under which a court may judge the contours of the restriction. Professor Scharpf, however, summarily has dismissed this cognitive approach to the political question doctrine: "I am at a loss to see how either the Common Law or American Constitutional Law could have grown and flourished if the courts had been unable or unwilling to perform the creative functions which this cognitive theory so categorically disavows for them."[188] Indeed, constitutional law is replete with examples of creative innovations fashioned by courts to judge the proper exercise of legislative power. In the area under consideration, courts routinely have reviewed findings of emergency for the purpose of exceeding a spending or taxation ceiling,[189] calling a special meeting to make additional appropriations,[190] or abridging a requirement that a government contract be subject to competitive bidding prior to award.[191] As a general matter, it is a long-standing principle that courts will review legislative exercise of the police power.[192] The exercise of police power expressly conditioned on a declaration of fact "may never possess valid-

187. Professor Henkin has observed that, even if such power is granted to the legislative branch, textual commitment does not necessarily place the decision beyond judicial review: courts "consider daily whether the political branches exercise power textually committed to them with due respect for constitutional limitations or prohibitions." Henkin, *supra* note 176, at 605 n.27.

188. Scharpf, *supra* note 176, at 555-56.

189. *E.g.*, Burr v. City & County of San Francisco, 186 Cal. 508, 199 P. 1034 (1921) (ordinance of Board of Supervisors declaring certain facts to constitute a great necessity not conclusive as to the truth of the facts stated); Continental Constr. Co. v. City of Lawrence, 297 Mass. 513, 9 N.E.2d 550 (1937); Murphy v. Town of W. New York, 130 N.J.L. 341, 32 A.2d 850 (1943); Tobin v. Town Council, 45 Wyo. 219, 17 P.2d 666 (1933).

190. *E.g.*, State *ex rel.* Kautz v. Board of Comm'rs, 204 Ind. 484, 184 N.E. 780 (1933).

191. *E.g.*, Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 358, 291 P. 839, 844 (1930); Saunders v. Board of Educ., 59 N.E.2d 936, 941 (Ohio Ct. App. 1944); Bak v. Jones County, 87 S.D. 468, 474, 210 N.W.2d 65, 68 (1973).

192. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 879-91 (1976) (discussing current state review standards with respect to state regulation of business, criminal procedure, religion, environment, and life-styles). The early *Brislawn* cases relied on Mugler v. Kansas, 123 U.S. 623 (1887), which decided the au-

ity if an obvious and vital mistake has occurred in the truth of the declaration . . . ."[193]

The *Kadderly* court took steps to reconcile its holding with the fact that courts will review the constitutionality of police measures. It declared that the police power is limited and thus implied that the contours of the police power are precise. The referendum exception, the court noted, "is broader and includes all laws, of whatsoever kind . . . whether they impose restraints on persons and property, or come strictly within the police powers, or not."[194] Presumably, in the *Kadderly* view, a court cannot review such unbridled discretion.

The *Kadderly* approach is wrong for two reasons. First, it allows the exception to swallow the rule. Only rarely, if ever, will legislation fall outside the exception. Clearly, this is not consistent with the purpose and philosophy of the permissive referendum. Second, the *Kadderly* reading of the public safety exception as broader than the police power runs counter to established principles. The police power is so comprehensive that it eludes definition.[195] Yet, as already noted, courts regularly scrutinize legislative action to determine if it falls within that power. Even more common is judicial review of declarations of "emergency." To accept the *Kadderly* doctrine is to take the power of the referendum from the hands of the voters and subject its use to the whim of the legislature.

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thority of the state to prohibit the manufacture of alcohol under its police power. The opinion states:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 661.

Since 1937, the Supreme Court has shifted its analysis from substantive due process to equal protection standards. *See, e.g.*, Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981) (employing equal protection analysis with respect to economic regulations). *See generally* Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

193. First Trust Co. v. Smith, 134 Neb. 84, 95, 277 N.W. 762, 768 (1938).

194. *Kadderly*, 44 Or. at 148, 74 P. at 720.

195. The police power has been defined broadly as the government's power to enact laws to promote the general welfare of its citizens. Jack Lincoln Shops v. State Dry Cleaners' Bd., 192 Okla. 251, 253, 135 P.2d 332, 335 (1943), *appeal dismissed*, 320 U.S. 208 (1944). One court views the police power as greater in scope than the public safety exception. State *ex rel.* Haynes v. District Court, 106 Mont. 470, 482-83, 78 P.2d 937, 944 (1938). Another views the powers as coterminous. State *ex rel.* Hughes v. Cleveland, 47 N.M. 230, 243, 141 P.2d 192, 200 (1943); *see also* Attorney General *ex rel.* Barbour v. Lindsay, 178 Mich. 524, 536, 145 N.W. 98, 102 (1914). Whether or not the public safety exception is similar in scope to the police power, it should be an independent limitation on the ability of the legislature to encroach upon the referendum process.

Such a result is particularly anomalous in light of the high value courts have placed on direct democracy. The ballot proposition process has been described as a fundamental right,[196] a precious right,[197] a shibboleth of democracy,[198] a demonstration of a devotion to democracy,[199] and a coequal with the elected assembly.[200]

Thus, in the hierarchy of rights under state governments, the permissive referendum deserves nearly as much protection as the right to vote itself. At the same time, disputes over the availability of the referendum resemble conflicts between branches of government—the voters in their legislative capacity clashing with the elected legislature. The judiciary intervenes in other interbranch disputes, however, and traditionally has been a zealous protector of civil and political rights.[201]

In a referendum case, a court is called upon to referee conflicting claims between two government institutions. Those claims involve the exercise of civil rights that have concomitant political overtones. In deciding such a case, it is not likely that a court will place its legitimacy at greater risk than it does in any other case involving the exercise of constitutional power.[202] Nor, in the words of Justice Brennan, will it be "expressing a lack of the respect due coordinate branches of government" or

196. McKee v. City of Louisville, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980).

197. Ortiz v. Board of Supervisors, 107 Cal. App. 3d 866, 870, 166 Cal. Rptr. 100, 103 (1980).

198. Walsh v. Cincinnati City Council, 54 Ohio App. 2d 107, 109, 375 N.E.2d 811, 813 (1977).

199. James v. Valtierra, 402 U.S. 137, 141 (1971).

200. *See* cases cited *supra* note 18.

201. When important civil rights are at stake, the Supreme Court generally has adjudicated the issues even though they touch upon political questions. Scharpf, *supra* note 176, at 584. Furthermore, the high court has not eschewed conflicting claims between departments of the federal government or between the federal government and the states. *Id.* at 585.

202. A recent development in constitutional law is the growing inclination of state courts to find protection for individual rights within the text of state constitutional provisions. *See generally* Howard, *supra* note 192. Justice Brennan instructs that

> state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

If one espouses the proposition that the right to refer legislation to the voters is an important right both from the perspective of the individual and the community, then perhaps this new dimension in state constitutional law will prompt a court to abandon legal fictions from a different time and take the right seriously.

their "political decisions already made."[203]

The *Kadderly* doctrine does have the advantage of making certain the effective date of any emergency measures. The availability of judicial review could cast doubt on which effective date will be enforced—the one normally provided in the absence of an emergency or the one declared by the legislature. This factor was noted by Judge Hill of the Colorado Supreme Court in his concurring opinion in *Van Kleeck v. Ramer*:[204]

> Other reasons which lead me to believe that [the legislature's declaration of emergency] was not intended to be left as an open question like the constitutionality of a law, [are] the consequences that might follow the application of such a system. Certainty as to what the law is and when it goes into effect, is always desirable. If, as is contended, the declaration of the Legislature means nothing unless in fact true, which can be decided by the courts, then everyone interested must, before it is reached by the courts, decide for himself whether it is true or false, and concerning things upon which there will always be diversity of opinion. . . .
>
> . . . The same uncertainty would apply to every law of this nature during the entire ninety days following the adjournment of every session of the general assembly. . . . Other illustrations could be given, but these are sufficient to convince me that had the legislature and the people thus intended they would have said so in language which would not be susceptible of a different, and, as I view it, a more rational construction.[205]

Certainty as to effective dates, however, may be more important than certainty as to the availability of the referendum. Whether a law is presently enforceable is of immediate concern to those who are potentially subject to that law. Whether a law is subject to suspension by referendum is a concern only if there is significant opposition to the law, and only if that opposition can gather sufficient signatures to effect a referendum. In those states that allow judicial review of the public safety

203. *Baker*, 369 U.S. at 217. *Brislawn* jurisdictions, in upholding judicial review, have also addressed the concerns that were later central to *Baker*. "The courts have the right to measure the law by the yard stick of the Constitution, and determine whether or not the lawmakers breached the Constitution in making the declaration." State *ex rel.* Westhues v. Sullivan, 283 Mo. 546, 589, 224 S.W. 327, 338 (1920). "In constitutional construction the rule always obtains that the intent of the people is the intent to be ascertained and upheld. It is for the courts to determine their intent, as expressed in the Constitution, and to construe acts of the legislature with reference to it." Attorney General *ex rel.* Barbour v. Lindsay, 178 Mich. 524, 532, 145 N.W. 98, 101 (1914). In Morris v. Goss, 147 Me. 89, 83 A.2d 556 (1951), the court reasoned that the legislature decides whether a fact exists, but the court draws legal conclusions from the facts, such as whether such facts constitute an emergency. *Id.* at 98-99, 83 A.2d at 561. In Otto v. Buck, 61 N.M. 123, 127, 295 P.2d 1028, 1031 (1956), the question was termed one of "judicial fact."

204. 62 Colo. 4, 156 P. 1108 (1916).

205. *Id.* at 19-21, 156 P. at 1113-14 (Hill, J., concurring).

exception, any accompanying uncertainty has not had noticeable adverse effects. Case law in jurisdictions following *Brislawn*[206] does not disclose an abnormal amount of appellate litigation concerning the effective date of statutes or ordinances.[207] To the extent problems may occur, an elected assembly or council may take steps to diminish their frequency by attaching public safety declarations only to those acts that are clearly urgent matters. The conclusive emergency rule[208] simply encourages the abuse of the clause. There is no reason that a court should not distinguish an effective date case from a referendum case and subject the former to a lesser degree of scrutiny than the latter. Such a two-tiered scheme presently exists in New Mexico.[209]

All legislation, whether at the state or local level, will suffer from uncertainty in the face of speculation concerning its constitutionality.[210] This is a latent defect of a constitutional system and is not limited to emergency effective dates or the referendum context. The question is whether expediency and certainty should outweigh the right to refer legislative acts. Convenience has not been deemed persuasive in other con-

206. State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 147 P. 11 (1915). See discussion of the *Brislawn* rule *supra* text accompanying notes 160-69.

207. *E.g.*, Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980) (holding that the "required publication" was not satisfied and plaintiff stated cause of action for violation of due process and equal protection because of arbitrary and capricious administrative action); United States v. Gavrilovich, 551 F.2d 1099, 1103-05 (8th Cir. 1977) (rule promulgated without 30-day notice invalidated for failure to show good cause); Texaco, Inc. v. Federal Energy Admin., 531 F.2d 1071, 1082 (Temp. Emer. Ct. App.) (review of emergency rule regulating price of petroleum), *cert. denied*, 426 U.S. 941 (1976); Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740, 744-45 (3d Cir 1969) (rule raising interest costs to natural gas producers invalidated for failure to provide notice); Kelly v. United States Dep't of Interior, 339 F. Supp. 1095 (E.D. Cal. 1972) (rule redistributing Indian reservation property invalidated for failure to state sufficient reasons to waive 30-day notice period).

208. *See supra* text accompanying notes 106-32.

209. Hughes v. Cleveland, 47 N.M. 230, 235-36, 141 P.2d 192, 196 (1943); Hutchens v. Jackson, 37 N.M. 325, 337, 23 P.2d 355, 362 (1933).

210. There are several schools of thought concerning the legitimacy and scope of judicial review of legislative acts under a written constitution. At one end of the spectrum are those who assert that enactments should be judged solely by the language of the constitution. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). At the other extreme are those who urge that a court must consider important social and historical norms extrinsic to the constitution in judging legislation. *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). Some occupy a middle ground identified as the process-oriented theory. These scholars argue that a court should intervene when the act in question violates an express provision of the constitution, discriminates against minorities, or adversely skews access to the political process. *See* J. ELY, DEMOCRACY AND DISTRUST 101-04 (1980). In any case, judicial review of a public safety declaration does not offend any of these theories. It passes muster under the more restrictive position because an express provision of the constitution is at issue, and it comports with the process-oriented school because access to the ballot box is a political right.

texts[211] and should not prevail here.

A Balancing Approach for Judicial Review

Once a court decides to review a legislative finding that an act is necessary for public safety, it must solve the difficult problem of choosing the appropriate standard of review by which to judge whether an act falls within the public safety exception. The United States Supreme Court has used differing standards of review to define the constitutional limits of governmental power according to the nature and importance of the protected right. The least restrictive test is whether the regulation or prohibition is reasonably related to any conceivable legitimate governmental objective. Government decisions will pass muster under this test if there is any rational basis for the legislation. The test is perfunctory and generally has been invoked to review economic regulations that do not impinge on fundamental rights or suspect classes.[212] At the other extreme, statutes that impair fundamental rights or discriminate against a suspect class must survive strict scrutiny and will be upheld only if they are necessary to promote a compelling state interest.[213] Finally, in certain cases, the Court has applied a middle standard of review, under which the court engages in an independent and meaningful review of the statute or regulation and strikes it down unless the statute bears a substantial relationship to an important governmental objective.[214]

Standards of review under state constitutional doctrine closely par-

211. For example, in Solem v. Helm, 463 U.S. 277 (1983), a majority of the Supreme Court rejected notions of expediency and certainty in holding that federal courts may review a state criminal sentence as disproportionate under the eighth amendment. Chief Justice Burger dissented, stating that "there is a real risk that this holding will flood the appellate courts with cases in which equally arbitrary lines must be drawn." *Id.* at 315 (Burger, C.J., dissenting).

212. Actions of the government with respect to social security regulations, business regulations, and zoning have been upheld under the rational basis test. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221 (1981) (upheld reduced medicaid benefits to certain institutionalized persons); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (upheld state statute prohibiting oil producers from owning service stations); County Bd. v. Richards, 434 U.S. 5 (1977) (upheld parking restrictions).

213. *Cf.* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938) (strict scrutiny test suggested for legislation affecting certain rights); *see also* Shapiro v. Thompson, 394 U.S. 618 (1969) (travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Bates v. City of Little Rock, 361 U.S. 516 (1960) (freedom of association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of convicts).

214. An example is gender-based classifications. Craig v. Boren, 429 U.S. 190 (1976). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Van Patten, *The Enigma of the ERA*, 30 S.D.L. REV. 8, 14-22 (1984).

allel those established by the United States Supreme Court.[215] Economic regulations are judged by the rational basis test,[216] and sometimes by a middle-level substantial relationship test,[217] particularly under the equal protection clause,[218] while interference with fundamental rights must survive strict scrutiny.[219]

In those states that permit judicial review of the public safety exception, courts generally have adopted the rational basis test that is normally applied to legislation passed under the police power. The declaration of emergency will be upheld when the act "does reasonably provide for the preservation of public peace, health, or safety."[220] Courts sometimes apply a lower standard of review to declarations of emergency and necessity. These clauses are considered "*conclusive* and must be given effect unless the declaration on its face is *obviously false* . . . ."[221] In selecting a

215. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1333-34 (1982).

216. *E.g.*, Belk-James, Inc. v. Nuzum, 358 So. 2d 174, 175 (Fla. 1978); John R. Grubb, Inc. v. Iowa Housing Fin. Auth., 255 N.W.2d 89 (Iowa 1977). *But see* Howard, *supra* note 192, at 882-91 (Some states continue to apply substantive due process concepts to economic regulation.).

217. *See, e.g.*, City of Russellville v. Vulcan Materials Co., 382 So. 2d 525, 527 (Ala. 1980) (regulation of explosives invalid because a less restrictive alternative was available).

218. Casey's Gen. Stores v. Nebraska Liquor Control Comm'n, 220 Neb. 242, 246, 369 N.W.2d 85, 88 (1985) (striking discriminatory regulation of liquor licenses under federal and state equal protection clauses).

219. *See, e.g.*, City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 131, 610 P.2d 436, 440, 164 Cal. Rptr. 539, 542-43 (1980) (voided restriction that no more than five unrelated persons could live in one dwelling within city limits); Murphy v. Pocatello School Dist., 94 Idaho 32, 38, 480 P.2d 878, 884 (1971) (struck down length of hair restrictions).

220. State *ex rel.* Hughes v. Cleveland, 47 N.M. 230, 237, 141 P.2d 192, 197 (1943).

221. State *ex rel.* Pennock v. Reeves, 27 Wash. 2d 739, 743-44, 179 P.2d 961, 963 (1947) (emphasis added), *overruled on other grounds*, State *ex rel.* Pennock v. Coe, 42 Wash. 2d 569, 257 P.2d 195 (1953); *cf.* State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 778, 380 P.2d 735, 737 (1963); State *ex rel.* Hoppe v. Meyers, 58 Wash. 2d 320, 326, 363 P.2d 121, 125 (1961); State *ex rel.* Pennock v. Coe, 42 Wash. 2d 569, 576, 257 P.2d 190, 195 (1953).

The "obviously false" standard has been adopted in several cases from various jurisdictions. California: Davis v. County of Los Angeles, 12 Cal. 2d 412, 422, 84 P.2d 1034, 1040 (1938) (must appear "clearly and affirmatively" that public necessity does not exist); Stockburger v. Jordan, 10 Cal. 2d 636, 642, 76 P.2d 671, 674 (1938) (quoted in *Davis*, 12 Cal. 2d at 422, 84 P.2d at 1040); Behneman v. Alameda-Contra Costa Transit Dist., 182 Cal. App. 2d 687, 691, 6 Cal. Rptr. 382, 385 (1960) (no "clear and affirmative" showing that declaration was incorrect); Hollister v. Kingsbury, 129 Cal. App. 420, 425, 18 P.2d 1006, 1008 (1933) (legislative finding of emergency invalid only if "statement of facts is so clearly insufficient as to leave no reasonable doubt that the urgency does not exist"); Illinois: Buck v. City of Danville, 350 Ill. App. 519, 527, 113 N.E.2d 186, 190 (1953) (legislative declaration is conclusive "absent evidence to the contrary"); Oregon: Greenberg v. Lee, 196 Or. 157, 175, 248 P.2d 324, 332 (1952) (declaration of emergency invalid if false on its face); Joplin v. Ten Brook, 124 Or. 36, 40, 263 P. 893, 895 (1928) (court will invalidate measure when "apparent on the face" that no emergency existed); Ohio: Walsh v. Cincinnati City Council, 54 Ohio App. 2d 107, 111, 375

standard, courts take into consideration "the face of the act itself; the history of the legislation, and contemporaneous declarations of the Legislature . . . ; the evil to be remedied . . . ; and the natural or absurd consequences of any particular interpretation . . . ."[222] But these factors are not themselves sufficient. The standard of review for the public safety exception must reflect the relative importance of the referendum power in our political system. Justice Stone, in a footnote to the Supreme Court's *United States v. Carolene Products*[223] opinion, suggests that discriminatory access to political processes may compel strict judicial review under the equal protection clause:

> It is unnecessary to consider now whether legislation which *restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation*, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.[224]

Although the United States Supreme Court has not yet addressed the question, it has sought to maintain the integrity of the political process by recognizing the right to vote as a fundamental right[225] and by striking down, under strict standards of review, state poll taxes,[226] malapportioned legislative districts,[227] one-year residency requirements for voting,[228] and unreasonable filing deadlines for candidacy.[229]

Is the permissive referendum of equal stature with these political rights? The question cannot be answered definitively. While courts pay homage to populist values,[230] judicial decisions tend to demonstrate be-

N.E.2d 811, 814 (1977) (declaration invalid when "obviously illusory"); South Dakota: Hodges v. Snyder, 43 S.D. 166, 176, 178 N.W. 575, 578 (1920) (declaration was an "absurdity"). *But see* State *ex rel.* Lindstrom v. Goetz, 73 S.D. 633, 636, 47 N.W.2d 566, 568 (1951) (issue of emergency is for the courts); City of Colome v. Von Seggern Bros., 56 S.D. 390, 393, 228 N.W. 800, 801 (1930) (measure invalid unless necessity shown); Johnson v. Jones, 48 S.D. 260, 263, 204 N.W. 15, 17 (1925) (emergency issue is for the courts); State *ex rel.* Richards v. Whisman, 36 S.D. 260, 274, 154 N.W. 707, 712 (1915) (measures clearly not within emergency exception will not be given emergency effect), *appeal dismissed*, 241 U.S. 643 (1916).

222. State *ex rel.* Goodman v. Stewart, 57 Mont. 144, 167, 187 P. 641, 649 (1920).

223. 304 U.S. 144 (1938).

224. *Id.* at 152 n.4 (emphasis added).

225. Reynolds v. Sims, 377 U.S. 533 (1964).

226. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

227. Reynolds v. Sims, 377 U.S. 533, 556-57 (1964).

228. Dunn v. Blumstein, 405 U.S. 330 (1972).

229. Anderson v. Celebrezze, 460 U.S. 780 (1983).

230. Most courts claim that the direct processes must be liberally construed to facilitate the exercise of this power. *E.g.*, Blocker v. Sewell, 189 Ark. 924, 928, 75 S.W.2d 658, 660 (1934) (initiative provision should be liberally construed to carry out the purposes intended); Alexander v. Mitchell, 119 Cal. App. 2d 816, 821, 260 P.2d 261, 263 (1953) (Initiatives and referenda should be liberally construed.); City of Aurora v. Zwerdlinger, 194 Colo. 192, 195, 571 P.2d 1074, 1076 (1977) (initiative and referendum to be liberally construed); Colorado

lief that the direct-democracy processes are an aberration rather than part of the mainstream of our political tradition.[231] This may result partly from the fact that the process tends to be repetitive. The opponents of a measure before the legislature or city council presumably have had an opportunity to lobby for its defeat. Courts may hesitate to grant the opponents' request for another bite at the apple by allowing referral of the matter directly to the voters, particularly when the proponents have mustered sufficient votes in the assembly, sometimes by a three-fifths or two-thirds majority, to pass the measure as a public safety act. A court that grants relief permits the opponents and the small percentage of citizens who sign the petitions to circumvent the judgment of the elected body charged with representing all of the public. As noted by the Maine Supreme Court in *Morris v. Goss*,[232]

> [the] controversy is not merely whether or not we have a sales and use tax in the State of Maine, but it involves the important principle of whether our Constitution permits a small minority of citizens who are dissatisfied with the form of taxation enacted by the Legislature to absolutely paralyze State government.[233]

Similarly, the Supreme Court in *Kramer v. Union Free School District*[234] applied a test of strict scrutiny with respect to the voting franchise, not because of the subject matter of the election—school issues—but because in that case the statute permitted some resident citizens to participate in the election while excluding others.[235] It was the discriminatory distribution of the franchise that triggered strict scrutiny. In the case of a public safety act, the vote is denied to all citizens, not to a

Project-Common Cause v. Anderson, 178 Colo. 1, 5, 495 P.2d 220, 221 (1972) ("[I]nitiative provisions . . . must be liberally construed to effectuate purpose."); Chouteau County v. Grossman, 172 Mont. 373, 378, 563 P.2d 1125, 1128 (1977) ("[I]nitiative and referendum provisions . . . should be broadly construed to maintain maximum power in the people."); City Comm'n of Albuquerque v. State *ex rel.* Nichols, 75 N.M. 438, 443, 405 P.2d 924, 927 (1965) (initiative and referendum laws liberally construed to effectuate policies behind them); State *ex rel.* Carson v. Kozer, 108 Or. 550, 555, 217 P. 827, 829 (1923) (initiative and referendum laws liberally construed to effectuate policies behind them); Cope v. Toronto, 8 Utah 2d 255, 259, 332 P.2d 977, 979 (1958) ("act authorizing initiative legislation shall receive a liberal construction").

231. The majority in State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 776-77, 380 P.2d 735, 738 (1963), points out that, historically, the court has been divided over the scope of the public safety exception and that whether the notion that the process should receive a liberal construction is "over-optimistic." Judicial skepticism surely underlies a holding that the closing of a street, *In re* Supreme Court Referendum Petition, 530 P.2d 120 (Okla. 1974), or the improvement of a sewer system, State *ex rel.* Tester v. Board of Elections, 174 Ohio St. 15, 185 N.E.2d 762 (1962), or outlawing punch cards, Greenberg v. Lee, 196 Or. 157, 248 P.2d 324 (1952), constitutes an emergency circumstance that supersedes the ballot option.

232. 147 Me. 89, 83 A.2d 556 (1951).

233. *Id.* at 108, 83 A.2d at 566.

234. 395 U.S. 621 (1969).

235. *Id.* at 629.

select few, and from that perspective, it should not command heightened judicial attention.

The adoption of the permissive referendum in many jurisdictions, however, signifies some positive judgment on its necessity and merit. The public continues to view the referendum power as a significant means of affecting governmental policy.[236] The permissive referendum has functioned infrequently but reasonably well, without suffering from many of the abuses feared by opponents.[237] Judicial hostility seems to be directed primarily at the manner in which the process is triggered, rather than the wisdom of submitting issues to the people.[238]

The value of the popular veto undoubtedly lies in the opportunity it presents to the citizens of a community to participate directly in making a decision that affects their affairs. Not all citizens will avail themselves of the opportunity, nor will all be capable of casting a rational ballot, but the opportunity to have a voice remains. Experience indicates that the popular veto has not unreasonably impaired the functioning of the primary institutions of government.[239] The likelihood of it presenting a greater threat in the future through increased usage is remote in light of the difficulties encountered in qualifying a measure for the ballot. Taken together, these considerations support the notion that courts are obligated to consider the right seriously, and should strike down a legislative nullification except in those limited cases in which the act is necessary to promote an immediate need or a compelling state interest.[240]

After selecting the appropriate higher standard of review, the court must balance the right of referral, not against legislative power per se, but against the immediate need of a community to enforce a new law without the delay occasioned by a referral. Courts that attempt to define the restriction further do so in functional terms, emphasizing an event or occurrence that if left unattended by legislative action will seriously impair the public welfare.[241] The crucial element in the formula is immedi-

236. *See supra* notes 88-92 & accompanying text.

237. *See supra* notes 38-105 & accompanying text.

238. The problem is determining what weight to attach to the popular veto in balancing it against the costs of the process. H. HAMILTON & S. COHEN, *supra* note 44, at 273-75.

239. *See supra* note 238.

240. *See supra* text accompanying notes 104-05; *cf. Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130, 1293-1303 (1972) (discusses strict necessity test for emergency acts that deprive individual liberties).

241. "This exemption was not intended to extend further than to matters arising out of some unforeseen menace, calamity, accident, sudden emergency, extraordinary occurrence, or unprecedented climactic condition, rendering immediate action imperative." State *ex rel.* Veeder v. State Bd. of Educ., 97 Mont. 121, 129, 33 P.2d 516, 519 (1934). "The necessity of a law for the preservation of the public peace, health, and safety implies that unless the law is passed

acy, signifying both the need for timely, but not necessarily instantaneous, action and an exposure to a substantial risk of serious harm in the absence of such action.[242] The following five factors should aid a court in this deliberation. They are not intended as a litmus test and no one factor is indispensable; each factor should be considered in the balancing process to illuminate the primary interests at state.

1. What will be the likely impact for the community, in whole or part, if the effective date of the law is delayed pending the referral?[243]

2. Is the law directed at a specific, identifiable occurrence that presents a substantial, yet short-term, threat to public welfare,[244] or is the law aimed at a chronic social or economic problem that cannot be solved without the long-term commitment of substantial human and financial resources?[245]

3. Is the law narrowly drawn and limited in its impact to a small part of the polity, or does it represent a fundamental policy choice for the community in general?[246]

4. Is the subject matter regulated by existing law that will remain in effect pending the referendum?[247]

5. Is the law more concerned with administrative effectiveness or statutory uniformity than with the management and control of a short-

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the public peace, health, and safety will be destroyed, or seriously impaired." State *ex rel.* Durbin v. Smith, 102 Ohio St. 591, 634, 133 N.E. 457, 469 (1921) (Johnson, J., dissenting). The crisis, however, need not be unforeseen or unexpected. State *ex rel.* Tyler v. Davis, 443 S.W.2d 625, 631 (Mo. Ct. App. 1969) (held rioting sufficient emergency circumstance).

In New Mexico, which omits the word "immediate" from the limiting clause, N.M. CONST. art. IV, § 1, no crisis or emergency need exist. " 'All that is required . . . is that [the act] bear a valid relationship . . . to some permissible object for the exercise of [the police] power.' " Otto v. Buck, 61 N.M. 123, 129, 295 P.2d 1028, 1033 (1956) (quoting Hughes v. Cleveland, 47 N.M. 230, 238, 141 P.2d 192, 198 (1943)).

242. Clearly the drafters of the public safety exception could have been more precise in defining its scope by including an additional adjective to describe the nature of the necessity, together with its immediacy, such as "acutely necessary," "extremely necessary," or "critically necessary." In any event, the interests at stake are relative in nature and abstract definitions are of questionable value in determining the priority of competing factors. *Cf.* State *ex rel.* Veeder v. State Bd. of Educ., 97 Mont. 121, 131-32, 33 P.2d 516, 521 (1934) (Emergency must exist when legislature acts, but action need not be carried into effect immediately.).

243. *See* State *ex rel.* Wegner v. Pyle, 55 S.D. 269, 280, 226 N.W. 280, 284 (1929) (balancing test to determine necessity for support of state institutions). A balancing test is consistent with an approach recommended for other forms of government regulation under its police powers. *See* Comment, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487, 1493 (1979).

244. *E.g.*, State *ex rel.* Taylor v. Davis, 443 S.W.2d 625 (Mo. Ct. App. 1965) (rioting).

245. *E.g.*, State *ex rel.* Burt v. Hutchinson, 173 Wash. 72, 21 P.2d 514 (1933) (legislation to provide funding of public old-age pension through proceeds of wagering on horse races).

246. *E.g.*, Gravning v. Zellmer, 291 N.W.2d 751 (S.D. 1980) (legislation for public purchase of a railroad).

247. *E.g.*, State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 776, 380 P.2d 735, 737-38 (1963) (amendments to existing gaming statutes).

term problem?[248]

The first factor considers the potential harm to the community in the absence of the protective legislation. One may assert that most of the social, political, and economic problems of our time are serious in nature and that if a legislative remedy is delayed by a referendum, there will be a substantial adverse consequence for the society. In reality, the issues that face us are not homogeneous in nature and vary in terms of intensity, commonality, duration, intractability, and susceptibility to remedial measures. Problems that are perceived as highly intense and explosive may require quick legislative action—free from voter interference—regardless of long-term policy implications. One example is the proposed temporary remedy for the agriculture crisis—a moratorium on mortgage foreclosures of family farms. Such a law probably will have some lasting impact on agricultural policy, but the compelling interest outweighs the referendum right. On the other hand, demonstrating a compelling interest is more problematic with respect to the issue of whether a jurisdiction should adopt a public lottery to bolster sagging finances. A lottery act should not be exempt from the permissive referendum simply because, pending the referendum, the absence of the revenue may squeeze operating budgets. If the situation is acute, then an interim measure may be necessary. Otherwise, the electorate should not be foreclosed from evaluating a fundamental shift in the sources of state or local revenue.

The second and third factors underscore the need for a legislative override for those issues of limited scope and relatively short duration, or those that can be dealt with in a temporary and restricted fashion. Two examples are the legislative response to the AIDS crisis and a local ordinance that bans the testing of new genetic crop frost inhibitors without adequate safeguards for existing plants.

The fourth factor identifies whether a referendum will leave a field completely void of any regulation pending the vote. Many public issues, such as gun control, obscenity, unemployment, or chemical dependency are subject to varying amounts of regulation and enforcement policy, which remain intact pending the approval of a different policy. In the absence of a compelling state interest or a limited solution to the problem, the ballot option should remain inviolate.

The last factor, administrative convenience, may arise in a legislative attempt to consolidate public school districts in order to equalize tax assessments and to promote efficiency and centralization. These can be

248. *E.g.*, State *ex rel.* Kennedy v. Reeves, 22 Wash. 2d 677, 157 P.2d 721 (1945) (act unifying control over state timber and creating State Timber Board).

hotly contested issues and rarely, if ever, compel the nullification of a permissive referendum.

These examples show how a balancing approach might work. Admittedly, the approach is not perfect; the outcome in many cases will depend upon the weight a court attaches to the opposing sides of the equation. Coupled with a stiff dose of judicial skepticism, however, this approach should result in preserving the values of a permissive referendum without undue harm to the community.

Conclusion

This Article reexamines a political right, known as the permissive referendum, introduced by the Progressive movement at the turn of the century as a means to control legislative abuses. The permissive referendum is generally defined as the power of the electorate to independently submit acts adopted by a legislative body to a vote of the people. This type of referendum continues to function as a part of the initiative and referendum machinery in place in many state and local jurisdictions. Yet, until recently, few commentators have discussed the jurisprudence of this process.

Several jurisdictions limit the exercise of the permissive referendum power by express constitutional or statutory language that exempts laws that are necessary for the immediate preservation of the public peace, health, or safety. Legislative bodies are permitted to trigger the exemption by stating that the act is a public safety measure. Courts are divided over the issue of whether this legislative finding conclusively nullifies the referendum option under all circumstances, or whether it is subject to judicial review. The Article provides a political assessment of the permissive referendum right and evaluates its significance to a community. The Article demonstrates that the permissive referendum right is an important democratic tool and that electors in general have exercised the right responsibly.

The Article examines two lines of opposing authority on the issue of reviewability. After analyzing the reasoning of decisions that support a rule of nonreviewability, the Article concludes that this approach is inconsistent with established constitutional doctrine and the intent of the referendum process. The Article outlines the relevant standards of review and suggests a balancing test to preserve the values of the permissive referendum while isolating those cases of compelling public need. Finally, the Article proposes several practical factors to aid a court in this balancing process and illustrates how they may be used in different cases to reach consistent results.